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THE COST OF LITIGATION

Reflections on the Evershed Report

There is a tendency to regard procedure and practice as of relatively slight importance in comparison with substantive law. Academic lawyers prefer to ignore it, practitioners have become so accustomed to its peculiarities that it rarely occurs to them to criticise its major characteristics,[1] and law reformers, in general, concentrate their activities on substantive law.[2] A distinguished High Court judge once declared that English substantive law was the worst in the civilised world and English procedure the best, and this, by and large, is probably the view of the average layman, who believes that the law is an ass, but English procedure and practice of unmatched excellence.

It is not the purpose of this paper to suggest that the latter part of this opinion is unfounded. On the contrary, it is believed that the quality of our judiciary and the standards of our advocacy are unrivalled, and that few countries, if any, can boast of a system in which to the same extent justice is both done and manifestly seen to be done to those who can afford to resort to the courts. But, and there's the rub, all too few can afford it; for if English procedure is the best, it is equally among the most expensive, and its expense is speedily making it a luxury beyond the reach of most individuals. Until recently only the dwindling number of the rich could contemplate litigation with equanimity; now, thanks to the Legal Aid Scheme, the dwindling number of the poor with disposable income of under £420 can face it with even greater nonchalance,[3] but to those in the growing "middle income brackets" it remains unattainable.[4] The result is that the

[1] The innate conservatism of the legal profession is here at its most extreme, for reluctance to contemplate change is as noticeable among its politically progressive members as among the politically reactionary.

[2] It is significant that the recent series of B.B.C. broadcasts (now published by Messrs. Heffers *sub tit.* "Law Reform and Law-Making") contained nothing about procedure.

[3] So that justice, unlike the grillroom of the Ritz Hotel, is now available to those in the bottom as well as the top drawer.

[4] As the Evershed Report points out (Cmd. 8878, para. 20) their lot has been worsened by the Legal Aid Scheme.

vast majority of disputes are never fought out. Assuming that the bargaining power of the parties is equal, the settlement out of court is likely to be fair enough,[5] and it is doubtless an excellent thing (for all but the lawyers) that there should be an amicable agreement. But often the economic positions are not evenly balanced, and when they are not the party with the larger purse is likely to drive a hard bargain which may amount to a grave injustice to his financially weaker adversary.

Moreover, and this is almost equally disturbing,[5a] even those who can afford litigation (such as powerful commercial corporations) are displaying an increasing reluctance to indulge in it. The practice of resorting to arbitration is becoming ever more common, with the result, for example, that the work of the Commercial Court has dwindled to a small fraction of what it was in its heyday.

In other words, litigation is fast becoming a luxury which few can afford, and which many of those who can, prefer to do without. At the worst the result is a denial of justice; at the best it marks the atrophy of the traditional judicial system of which we are deservedly proud. If, as is believed, this is an accurate diagnosis, it is apparent that the traditional attitude of apathy and complacency is a dangerous anachronism.

In the light of these considerations the importance of the work of the Evershed Committee, whose final report has just been published,[6] can scarcely be exaggerated. The object of this paper is to review briefly the Committee's recommendations, to consider whether, if implemented, they might provide a sufficient cure of our ills, and to suggest what follows if they would not.

It should, perhaps, be said at once that professional reaction to the final report has been a mixture of disappointment and relief. This lukewarm reception has been due, not so much to objections to what is recommended (although the Bar, as might have been expected, has reacted strongly to the suggested limitation on the amount of "refreshers"[7]), as to a general feeling that the recommendations are less far-reaching than are needed and had been expected. The Committee must take some blame for this reaction, for they certainly aroused false hopes, or fears, of something more sweeping; having deliberated for six years and, in an interim report, hinted at "decisions—possibly far-reaching

[5] But if one party is obstinate he may force his more reasonable opponent to cut his losses by abandoning a just claim.

[5a] Particularly as the arbitration clause is commonly in a "contract of adhesion" which the other party has no option but to accept, thus forcing him to submit to an adjudication conducted without the safeguard of publicity.

[6] Cmd. 8878/53. This followed interim reports published as Cmd. 7764/49 (noted in 12 M.L.R. 483), Cmd. 8176/51 (noted in 14 M.L.R. 325), and Cmd. 8617/52 (dealing with the Durham Palatine Court).

[7] See "Q.C.'s" letter in *The Times*, July 24, 1953.

in effect—upon matters of general principle" any report which leaves general principles unchanged is bound to be something of an anti-climax. But, in truth, this result seems to have been inevitable, because of the gloss put upon their wide terms of reference by the former Lord Chancellor, who informed the Committee that "they should not seek to disturb the existing organisation of the English legal system,"[8] and who ruled as outside their terms of reference something as apparently unsensational as a suggestion that court fees should be abolished.[9] Having regard to these rulings the Committee could do no more than suggest what might be accomplished without changing the characteristic features of English procedure. That some, at least, of the members regretted this limitation on the scope of their inquiries is apparent from the Addendum by four of them,[10] in which they point out that "the result is that many of the characteristics of the English legal system have not been discussed." But, however regrettable this may be, it does at least mean that the Committee have "performed the service of showing exhaustively,[11] what can be done without the need for any . . . sweeping changes."[12] It is precisely this that makes the report so significant. We now know the limits to what can be done if we retain the present basic organisation; if changes within these limits will not render litigation sufficiently attractive and sufficiently cheap fundamental alterations in our legal organisation will have to be faced. We may have to reconcile ourselves to the sacrifice of some perfection in the interests of utility; for the legal edifice must continue to be lived in and not allowed to become a museum.

A. Characteristics of English Procedure[13]

What then are these peculiar characteristics of our system of civil jurisdiction which may account for its relative perfection as they certainly explain its relative expense? They may, it is thought, be summarised as follows:—

1. *Extreme Centralisation*

For small claims there is, it is true, adequate decentralisation to the county courts. But the jurisdiction of the latter is severely limited—speaking generally to claims for under £200—and apart from some mitigation through the limited amount of civil work

[8] Cmd. 8878, para. 24.
[9] Cmd. 8176, para. 141.
[10] Sir Thomas Barnes, Mr. Geoffrey Crowther, Dr. E. G. M. Fletcher, and Professor T. H. Marshall.
[11] Perhaps not quite exhaustively: see *infra*, note 80.
[12] Cmd. 8878, para. 36.
[13] Compare the Committee's somewhat different formulation of these characteristics in Cmd. 8878, paras. 25–31.

taken on assize, and through the survival of certain useful historical relics such as the Palatine Courts, all civil work is centralised in London.

2. *Divided Profession*

In the High Court the litigant is bound to employ and pay for at least two professional advisers—the solicitor and the barrister. And if the case is one appropriate to a Q.C., at least three—solicitor, junior counsel and leader. If, as may well have been the case (for example, in connection with a tax problem), he has gone first to his accountant, a further adviser will be added to the list.

3. *Contentious Procedure*

The obligation is cast wholly on the parties of proving their cases. The judges and court officials are not inquisitors charged with making inquiries to ascertain the objective truth, but are there merely to pass judgment on the balance of probabilities as disclosed by the evidence produced to them by the parties. Only as regards questions of law, as opposed to fact, are the judges entitled to rely on their independent knowledge and to make their own researches, and, even as regards law, they are guided in practice by counsel who "remind" them of the law and decide solely on the basis of the arguments put before them.

To these three basic characteristics some would add a fourth and fifth.

4. *Written Pleadings and Opportunities for Interlocutory Applications* and

5. *"Orality" of Hearings*

In the High Court great stress is laid on the reduction of the points at issue by an exchange of written statements and on arming both parties for the battle by enabling them to apply for discovery, further particulars, leave to administer interrogatories and the like. And in most cases, even if the evidence consists mainly of documents, it may be necessary to produce witnesses to prove that the documents are what they purport to be and, in general, their contents will not be admissible as proof of the facts stated except against the maker of them. But the former characteristic does not apply in the county courts, nor does the latter necessarily do so in the Chancery Division, where evidence is most often in the form of written affidavits.[14] Hence, although both strike an observer familiar with Continental systems,[15] it is

[14] But even there the affidavits will be laboriously read out by counsel at the hearing.

[15] Particularly the "orality": *cf.* Professor Hamson in his series of B.B.C. broadcasts with Professor T. F. T. Plucknett now published by Messrs. Heffers under the title "The English Trial and Comparative Law."

doubtful whether either can be regarded as fundamental or essential to the same extent as the first three characteristics. Both could, it is submitted, be eradicated or at least modified, without a complete reorganisation of our system—and, indeed, they have already been modified and the Evershed Committee recommend further changes. Possibly of greater significance than either is what may be termed:

6. *The Attitude and Atmosphere of the Courts*

Ingrained in our system, and explicable like so much else on historical grounds, is the idea that in providing the machinery of justice Her Majesty is graciously condescending to allow her people a glimpse of the exercise of one of her royal prerogatives which her people should accept with humble gratitude and duty. In so far as this idea gives rise to impressive ceremonial enhancing judicial dignity and prestige, it is wholly desirable, even if some may think that wigs and similar inconvenient theatrical trappings might be dispensed with without any loss of either. But what is less desirable is the impression often left in the mind of the litigant that everything is adapted to suit the convenience of the court—the time of which must not be wasted whatever else is—and that nothing is done to meet the convenience of the litigant, notwithstanding that it is his problems that are being dealt with at his not inconsiderable expense. The court, it is made very clear to him, is not his servant; on the contrary, it almost seems to him as if he is the servant of the court, for whose edification he is required to play a humble part in an impressive but obscure drama. This is doubtless exaggerated, but it is not entirely without foundation,[16] and the irritation which it causes to litigants, and especially to business men who (or whose companies) could well afford the cost, may partly account for the drift away from the courts towards arbitration. An arbitration may prove equally expensive but at least the parties have a considerable say in how, when and where it shall be conducted. It is not unnatural for those who pay the piper to want some right to call the tune.

B. Recommendations of the Committee

Within the limits of these principles the Evershed Committee have sought to find means to reduce costs to an adequate extent. Here

[16] Recently at the end of the second day of a difficult part-heard case the defendant was told that his counsel would be unable to attend the next day's hearing, as he would be engaged in another court, and that instead the brief would be "devilled" by someone who was a complete stranger to him. He found it difficult to grasp that there was nothing that could be done, and that it was useless to apply to stand over one or other case. One must have some sympathy with his plaintive cry "They can't do this to me I'm paying them, aren't I?" And *cf.* Devlin J. at 14 M.L.R. p. 250, ". . . the somewhat aloof dignity of the ordinary court of justice, with the feeling that the recipient ought to be glad to get whatever he is given. . . ."

no more can be done than to draw attention to the most important of their recommendations. Many of these are contained in their first two interim reports which have already been commented on in this *Review*,[17] but it will be convenient to mention once more the most vital of them as well as those in the final report.[18]

1. *Encouragement of Resort to County Courts* [19]

Litigation in the county courts is cheap, relatively and perhaps absolutely. Hence the Committee recommend encouraging resort to these courts. Their suggestion for extending the county court jurisdiction (speaking generally from a maximum of £200 to £300) does little more than recognise the fall in the value of money. Of more importance are their proposals for dissuading resort to the High Court in small claims within the county court limits, by penalising in costs those who do. Though these proposals are valuable so far as they go they do nothing, of course, to reduce costs in cases above these, still pitifully small, limits.

2. *Fixed Dates for Trial in the High Court* [20]

It seems incredible that England (alone among civilised countries [21]) is unable to tell litigants when their cases will be heard. Failure of previous experiments to remedy this have been wrecked by a refusal to recognise that some loss of judicial time is a small price to pay—a refusal flowing, of course, from the sixth of the major characteristics listed above. The Committee recommend that a system of fixed dates of trials in London should be instituted forthwith, but are unable to suggest its immediate extension to assizes. Few will be found to dissent from the opinion of the Joint Committee of the Bar Council and the Law Society that " no single step would be likely to achieve greater results in reducing the cost of litigation " than a system of fixed dates.[22] If such a system is introduced (even if only in London) *and made to work efficiently*, it alone will have justified the Committee's labours. But it will only work efficiently [23] if there is an adequate

[17] 12 M.L.R. 483, 14 M.L.R. 325. The third interim report (dealing with the Durham Palatine Court) is not dealt with because of its specialised nature. This, however, does not mean that it is regarded as unimportant; on the contrary the court is one living example of decentralisation which, as will appear later, I believe to be essential.

[18] Readers whose tastes are sufficiently eclectic to embrace both *Punch* and Command Papers may have noted that some of the Committee's proposals were originally ventilated in a series of articles in the former periodical (subsequently reprinted *sub tit.* " Codd's Last Case "). The transfer from the one publication to the other was doubtless facilitated by the presence on the Committee of Sir Alan Herbert.

[19] Cmd. 7764, see 12 M.L.R. 483.

[20] *Ibid.*

[21] Cmd. 7764, para. 63.

[22] *Ibid.*, para. 50.

[23] Perhaps I may mention a personal experience of the " experimental " fixed date system in the Ch.D. A date was fixed well in advance. The case was in the list for the date fixed but was marked " not before mid-day." At the luncheon

reserve of judicial strength,[24] and if judges can be persuaded that an occasional loss of their time is relatively unimportant. Moreover, it must be realised that the major saving will be in the "invisible" costs to litigants, witnesses, and their advisers of the present waste of time and dislocation of their working programmes which are not reflected in any bill of costs. The reduction in the size of actual bills will be relatively small.

3. *The "New Approach"* [25]

Underlying the whole of the Committee's recommendations in their final report is the determination to introduce a new approach to litigation, and to impress upon all concerned with the machinery of justice that it is their duty to exercise constant vigilance in the matter of costs. They draw attention to the "general failure to make adequate use of the many opportunities to save costs at the trial, already provided by the existing Rules," [26] and suggest that an "educative effort" is required to impress upon the litigant's legal advisers that they owe him a special obligation in this regard.[27]

Here, the Committee seems to do less than justice to the legal profession, who are, it is thought, fully conscious of this duty. The trouble is, that the duty is one which they owe to their own client, and, since "it is at, or in immediate preparation for, the trial that most of the costs are incurred," and "the amount of the costs increases rateably (and substantially) with the length of the trial," [28] the best way of saving their client costs is to induce a collapse of the opposition or a favourable settlement before trial. But if their client is financially the stronger, the best way of producing this result may be by making the financial burden too heavy for the other to bear. Probably most solicitors would be unwilling to admit, even to themselves, that they adopt these tactics,[29] but probably fewer still, in their heart-of-hearts, would not agree with those members of the Committee who "are by no means satisfied that the danger of one party 'running the other

adjournment it was marked "not today." Precisely the same thing happened on the following day and the case then had to be stood out as counsel had other engagements. A new date was fixed (with some difficulty) but with much the same result, the case eventually starting at 3.15 p.m. on the second day. All concerned with the case had wasted the greater part of four days and (as the case was expected to last three days) could make no other engagements for the better part of two weeks.

24 "To have too few judges at any point in the purveying of justice is the falsest of economy." *The Times* leader-writer, September 5, 1949.

25 Cmd. 8878, Sect. I.

26 Para. 13.

27 Para. 14.

28 Para. 22.

29 It is significant that both the Law Society and the Solicitors' Managing Clerks' Association expressed the view that the danger of one party "running the other up" in costs was much exaggerated: para. 686.

up' in the matter of costs is not a real one and one that frequently occurs."[30]

Hence, neither pious exhortations nor opportunities for practising economy are likely to be successful in producing a "new approach." What is needed is something which makes it impossible to be extravagant, or, at any rate, which prevents the extravagance from redounding to the disadvantage of the other party.

To some extent this is recognised by the Committee, who agree that there will not be this approach "so long as the traveller is bound to proceed along the old and accustomed roads."[31] Accordingly, they make proposals designed to remove the atmosphere of secrecy engendered by the fact that at present each party marshals his forces for the trial behind a screen which the other party may not penetrate, and to eliminate some of the steps taken almost as a matter of course before the trial. And as a first step in this direction they recommend that the less formal procedure by originating summons should be more generally available, and that an analogous new procedure, commenced by writ but dispensing with pleadings and substituting affidavits, should be introduced on an optional basis for use, particularly, in the Queen's Bench Division.[32]

The details of these recommendations cannot be given here, and it must suffice to say that there seem grounds for sharing the Committee's hope that in appropriate cases the suggested procedure might result in some saving of time and expense, for it would enable a plaintiff who wished for a relatively speedy trial with much cheaper preliminaries to obtain one in certain circumstances. The success of the procedure will necessarily be dependent on whether the profession make use of it whenever possible, and this, for reasons already stated, may require a change of outlook on their part.[33] But it is encouraging that the suggestions were based on those of the Bar Council, and one can only hope that the scheme will not suffer the fate of the short-lived New Procedure Rules of the 1930s.

4. *Pleadings and Interlocutory Proceedings*[34]

The Committee make a considerable number of recommendations under this head, but none of a revolutionary character. Among the more interesting are that the statement of claim should normally be endorsed on or attached to the writ, that procedure for entering an appearance should be simplified and its name changed to the more readily understood "notice of intention to

[30] Para. 687.
[31] Para. 79.
[32] This new procedure would resemble that under Ord. 14 where the defendant obtains leave to defend and the action is set down in the Short Cause List.
[33] Which might be facilitated if plaintiffs were penalised in costs when they failed to adopt the procedure in cases where it was clearly appropriate.
[34] Cmd. 8878, Sect. II.

defend," that amendment of pleadings, discovery and inspection, should normally be effected without application to the court, and (perhaps of most importance) that efforts should be made to reduce the great expense of copying documents by penalising in costs unnecessary duplication. In general, however, this part of the report is more interesting for what it considers only to reject; for example, despite the wish to remove the screen of secrecy, it is not recommended that parties should be required to exchange proofs or lists of witnesses,[35] or that each party should, at a preliminary stage, attend for questioning by his opponent.

5. *Summons for Directions* [36]

The Committee point out that in cases not suitable for the new procedure referred to in paragraph 3 above, the objects may often be attained by strengthening the summons for directions [37] so that upon it a more robust use is made of powers to reduce expense. In the words of the Peel Report,[38] " the object of this summons would be a general stock-taking of the case with the object of arriving at the essentials of the dispute and arranging for proof of the necessary facts in the shortest and cheapest manner." The Committee consider, only to reject, the possibility of converting the summons into a " pre-trial conference " which has proved so successful in the U.S.A., or of adopting analogous procedures used in British Columbia and South Australia. Instead, they recommend that, except in personal injuries actions,[39] the summons should be taken after the time limited for discovery, since, as a result of their previous recommendations this, like pleadings, will have been dealt with by rule, and that it should be used for the type of stock-taking which the Peel Commission advocated. They want to see much more extended use made of existing powers to relax the strict rules of evidence, to get the parties to admit facts not really in dispute, and to abandon wild allegations. As the Committee point out, the existing rules are not fully used,[40] and if they were there might be a considerable saving.

Unfortunately, here again, their recommendations amount to little more than pious exhortations.[41] They reject the suggestion that the summons should be taken by the trial judge [42] (as in the

[35] Except to a limited extent as regards expert witnesses, see below.
[36] Cmd. 8878, Sect. III.
[37] The " step in the action that must in all cases be taken as distinct from applications of an interlocutory character which one or other party may but is not bound to make ": para. 212.
[38] Cmd. 5065, para. 235, quoted *ibid.*, para. 210.
[39] These, arising out of accidents in the street, factory or elsewhere, account for over 40 per cent. of all Queen's Bench actions. The Committee give separate consideration to them in Sect. V of the report.
[40] Their explanation for this (para. 211) shows that the fault does not lie wholly with the legal advisers.
[41] " We emphasise that education is required . . . with the co-operation of the Bench, the Bar Council, and the Law Society," para. 255.
[42] Largely because of " the inroads on judicial time "—the same hoary excuse.

Commercial Court)—the one step which might have made it really effective—though they hope that, on appeals from the master, "the weight and influence of the judge would be thrown on the side of an effective use of the powers conferred."[43] Apart from this, their only concrete suggestions are that the appropriate rules should be redrafted so as to emphasise the court's responsibilities, and that the master should be required to certify whether or not the case is fit for two counsel and, if a negative certificate is given, only the costs of one counsel should be recoverable as between party and party.

6. *Evidence and Trial*[44]

The Committee agree that the differences between the English contentious and the Continental inquisitorial systems of trial, and between the rules of evidence which flow from them, are among the main reasons for the difference in expense. If the fundamental characteristics of our system are to be preserved the Continental system clearly could not be adopted in its entirety, but there is no reason why our strict rules should not be substantially relaxed. Numerous and useful suggestions are in fact made under this head but none go so far as many will think possible and desirable.

Thus, although they advocate the avoidance of the need to call witnesses to prove the authenticity of documents and extended acceptance of documentary evidence, they are not prepared to support the abrogation of the hearsay rule. That this could be done without destroying any of the fundamental characteristics of our jurisprudence seems to be shown by the practice in commercial arbitrations and by the Committee's recommendation that judges should announce their willingness to conduct cases on a similar basis if both parties agree. Nor, it is submitted, does the practice in arbitration support their view that a general relaxation would increase rather than diminish costs. However, it is good to see the recommendations that a more extended use should be made of court experts, and that the reports and diagrams of the parties' experts should be disclosed in advance to the other party.[45] Also useful is the suggestion that the pleadings should be available to the judge before he comes into court, and that "in appropriate cases" (why not always?) he should inform counsel that he has read them, so that opening speeches may be reduced to a minimum. In a later section[46] the Committee recommend that the Court of Appeal also should read the papers beforehand.

[43] Para. 243.

[44] Sect. IV.

[45] See also Sect. V, paras. 349–57, relating to medical and other expert evidence in personal injuries actions.

[46] Sect. VIII, paras. 583–90.

7. *Execution of Judgments* [47]

Little space can be devoted here to this highly technical, and incredibly antiquated, branch of the law. But this aspect of the report is of the greatest interest, representing, as it does, the first inquiry into a subject which has hitherto been shunned with understandable expressions of distaste. If the Committee's recommendations are carried out we shall not be given a brand new edifice, but at least a partially modernised one from which several old features, such as *elegit* (but not dear old *fi. fa.*), will have been removed.

8. *Appeals* [48]

The sections dealing with this subject are among the most interesting and, as some will think, disappointing parts of the report. The Committee agree that, "as a matter of general principle, one appeal from the trial judge should suffice." [49] But, having so agreed, the best they can do to implement it is to recommend the introduction of a very restricted "leap-frog" procedure (operating side by side with the existing arrangements) whereby certain appeals, if certified as suitable by the trial judge on application to him, would go direct to the Lords, leap-frogging the Court of Appeal.

This proposal is certainly valuable so far as it goes. It will enable one tier in the appellate structure (but not, alas, the more expensive one) to be cut out if one party starts with the determination to obtain a ruling of the House of Lords on some disputed point of law or statutory interpretation. But these cases are rare and normally only occur when the parties concerned are so wealthy that money is no object.[50] The average litigant, with whom the Committee are primarily concerned, will not benefit at all for he will be mad if he makes an application [51] whereby he restricts his right of appeal to a right to go to the Lords—so infinitely more expensive than the Court of Appeal.

Among the other proposals, one that will give rise to dispute is that there should in some circumstances be a right of appeal from a county court on questions of fact. Doubtless the Committee are right in suggesting that county court judges are at least as fallible as High Court ones, but instead of drawing the conclusion which economy demands (the abolition of appeal from the High

[47] Sect. VI.
[48] Sects. VII and VIII.
[49] *Ibid.*, para. 485.
[50] Most often in a Revenue Appeal.
[51] Unless he had been successful in obtaining a right to litigate at the public expense under the suggestions outlined below (para. 9) in which event, too, the expense is irrelevant to him.

Court on pure questions of fact [52]), they prefer to introduce an extended right of appeal in the county court, notwithstanding that this will add to, instead of reducing, costs. Here the Committee seem to have succumbed to the perfectionist tradition and to have forgotten that perfection may be attained at too great a cost.[53]

9. *Litigation at the Public Expense* [54]

Closely allied to the subject of appeals is that of litigation at the public expense, which was a topic specifically referred to the Committee. They reject the obvious solution of consultative cases, submitted by the Attorney-General to the House of Lords, despite the precedent of the machinery which already exists in the Privy Council. This would doubtless have a very limited range of usefulness but the Committee do not put forward any convincing reasons why it should not work in some cases,[55] and be introduced as the most economical method of securing legal development and clarification. They also dismiss as beyond their terms of reference the suggestion that all successful appeals should be at the public expense. This seems to be another unfortunate restriction on the ambit of their inquiries and certainly the case for the suggestion is strong, especially when the appeal is on a point of law. The argument is not so much that the judge has been proved at fault—for on the existing state of the authorities and on the arguments presented to him he may have come to the only conclusion open to him—but that the litigant is being made to pay for the uncertainties of the law. Be that as it may, the Committee could not consider it, although they recommend that a limited scheme at present on trial in New South Wales should be kept under observation.

The suggestion of the Committee is that where the Attorney-General considers that a case involves a point of law of exceptional public importance, he should have power to issue a certificate authorising public funds to be used to assist the parties to prosecute the case. The parties would normally be left to contest the case in the ordinary way and would be bound by the result, but the Attorney-General would have a right to appear. Even if no application for assistance were made the Attorney-General

[52] Rather surprisingly, the report says that this "has not received support from any responsible quarter": para. 479. Possibly the explanation is that it is generally recognised to be unprofitable to appeal from a High Court judge on a pure question of fact so that it rarely occurs.

[53] Not that perfection will be attained, for the Committee reject as impracticable the introduction of official shorthand-writers in the county courts, and are not yet prepared to support mechanical sound recording (undoubtedly the ultimate solution): paras. 558–9.

[54] *Ibid.*, Sect. IX.

[55] For example, where the question is one of construction of a statute or statutory instrument and no complicated hypothetical case is needed: a good illustration is afforded by *Berkeley* v. *B.* [1946] A.C. 555, H.L.; and why, if the facts are agreed, should not the parties (without the intervention of the Attorney-General) be allowed to present a case stated direct to the C.A. or H.L.?

would have a right to apply for leave to intervene and, if necessary, to prosecute an appeal at his own suit, but in the latter event the result should not affect the rights of the parties.

This proposal is a fascinating one and, if implemented and liberally applied, should do much to enable the law to be clarified without resort to the more cumbersome and expensive remedy of legislation. It is also a real attempt to meet the criticism that the individual litigant is made to pay for the clarification of the law for the benefit of the general public. But it will not meet the further criticism that, under our system, legal development is dependent on the accidents of litigation and follows instead of preceding the disputes which it is designed to settle.

10. *The Limitation and Assessment of Costs* [56]

This section of the report is, of course, crucial. The Committee point out that the present system allows unrestricted freedom of bargaining between a solicitor and his own client, and normally confers upon the winner the right to recover a qualified indemnity (qualified because party-and-party costs are lower than solicitor-and-own-client costs). Some of the members consider (rightly, it is thought) that this system itself gives rise to a tendency to incur costs on an extravagant scale, and to drive the other party to do likewise. The problem can be tackled from two ends; either by restricting solicitor-and-own-client costs or by limiting the amount of the indemnity or abolishing it altogether. The former would involve limiting the amount which a party was entitled to spend on the presentation of his case and, unlike the second alternative, would directly cut the total expenses of litigation. But the Committee reject it because they think it would be impossible to evolve a workable scheme. "At the best it would be a matter of extreme difficulty to supervise, and even to assess, the costs actually incurred as between solicitor and client. There would be a danger of the honest suffering at the expense of the less scrupulous. And, at the worst, the result might well be to drive a great deal of the work of litigation into the hands of the less reputable members of the legal profession.[57]

If this objection is well founded it is a shocking reflection on our professional organisation. Barristers and solicitors have a monopoly of practice justified on the ground that thereby the public are protected from crooks and charlatans. If our professional bodies are not in fact sufficiently strong to exercise discipline over their members it is difficult to justify this "closed-shop." In fact it is not believed that the implied strictures are just. Doubtless a scheme of control on expenditure would be difficult to work out, but the

[56] Sect. X.
[57] Para. 690.

difficulty suggested is not the most serious one. And only if solicitor-and-client costs are tackled is the total cost of litigation limited,[58] and the less wealthy party put on a parity with his richer opponent who would be prepared to spend more on his case if he could, even though he may have no hope of recovering all he spends.

It is therefore believed that it is from this end that the problem should be tackled. And in fact the Committee meet equal difficulties in attempting to attack it from the other end. They examine schemes ranging from the total abolition of any right of the winner to recover costs from the other party, to the introduction of detailed scales prescribing the recoverable costs at every stage, but none secures sufficient agreement to be recommended as both practicable and desirable. In the end they content themselves with recommending the retention of the existing system subject to minor improvements. Their conclusion is unlikely to give much satisfaction in any quarter, certainly not among solicitors who have long been pressing for the extension to litigious matters of the greater freedom of charging recently accorded to them in non-contentious business.

11. *Counsel's Fees*[59]

This is perhaps the thorniest subject of all—so much so that it produced disagreement among the members of the Committee, four of whom[60] signed an Addendum to the report criticising the majority for not going far enough in their recommendations. The latter's proposals are extremely conservative—although even they have not escaped criticism from an ultra-conservative profession.[61] Briefly they are:—

(a) The promulgation of a revised code of professional conduct and the establishment of a disciplinary body, combining representatives of the Inns and the Bar Council, which should have power to direct remission or return of fees in cases where the charge has involved a breach of the code.

(b) Remission of fees when counsel has been unable to attend the hearing.

(c) Abolition of the practice of making a separate charge to the client in respect of clerks' fees.

(d) Reduction of leader's "special fees" when they appear on a circuit of which they are not members and general remission of "special fees" in certain circumstances.

[58] "Schemes which are intended and able to do no more than reduce the party and party bill . . . cannot fairly qualify as candidates for reducing the costs of litigation, except in so far as they act indirectly to induce parties to litigate with the strictest economy": para. 37.

[59] Sect. XI.

[60] For names, see note 10. For the sake of convenience they are frequently referred to below as "the minority," but they make it clear that they are not submitting a minority report, dissenting from that of the majority, but merely advocating an extension of the main report in certain respects.

[61] See note 3.

(e) A reduced scale of " refresher " fees,[62] which, as the report makes clear, at present account for the major item taxed off as between party-and-party.

(f) A descending fractional scale in place of the present two-thirds rule.

Sir Thomas Barnes and his three colleagues are somewhat more radical. As regards (a) they point out that it will be difficult to prove an actual breach of the code and invidious and distasteful for a solicitor to allege it. While supporting the principle of free negotiation they emphasise that the fact that a certain fee has been marked does not necessarily mean that it has been freely negotiated, and they suggest that where a solicitor considers the fee demanded to be excessive he should have power to mark it as a provisional fee which could subsequently be reviewed by a body charged with that duty. They would be content that this body should be constituted by the Bar Council but if, as suggested, the profession would find it difficult and embarrassing to review the fees of their professional brethren,[63] then it should be undertaken by the taxing masters, who, after all, already carry out similar functions on taxation.

While this minority proposal seems more realistic, it is arguable that neither side makes any serious attack on expense caused by the high fees demanded by the small number of fashionable silks and juniors, who monopolise most of the work. No one can seriously suggest that the Bar *as a whole* is excessively remunerated,[64] but equally there is no doubt that the not unnatural wish of a litigant, who has taken the plunge, to go all out for victory by briefing one of the big names (and thereby driving his adversary to do likewise) accounts in no small measure for excessive costs. Having insisted that solicitors' remuneration, even as between solicitor-and-client, shall be subject to an outside check and determined on the purely objective basis of a fixed scale, it is difficult to see why, as regards barristers, the majority reject this completely and why even the minority support a purely subjective basis mitigated only by the possibility of an outside check which, in practice, would only operate in really glaring cases.

The minority also favour a root-and-branch removal of the two-thirds rule.[65] In their own words[66] : " Junior counsel should be

[62] As between barrister and client contracting out of this scale would be permissible.

[63] They point out that " other professional bodies apparently have no such difficulty," Cmd. 8878, Addendum, para. 6.

[64] Evidence supporting this is furnished by *The Times* article of August 13, 1953, which gives actual figures which have hitherto been difficult to obtain but which were supplied as a result of the " change of heart " inspired by the report. But it is no less true that solicitors are not excessively remunerated in respect of litigious work.

[65] This view is supported by a large number of bodies including the Law Society, the F.B.I., the Association of British Chambers of Commerce, and the T.U.C., see Cmd. 8878, Sect. XI, para. 857.

[66] Addendum, para. 7.

paid a fee for his services at the trial commensurate with the amount of work he does and the responsibility he takes. We can see no justification for a rule under which if an experienced and therefore highly paid leader is engaged, the junior should for that reason alone get a higher fee, although his responsibilities will probably be less than if he conducted the case alone or had a less competent leader with him. . . . It is said that it is impracticable to fix the junior's fee without some proportionate rule. We do not agree that this is so—we see no greater difficulty in fixing the junior's fee where he is engaged with a leader than where he is engaged alone."

This seems unanswerable. Equally unanswerable (at any rate on purely rational grounds) is the minority's further suggestion of the abolition of the rule that a leader can only appear with a junior. "The junior should be engaged with the leader because the case justifies it and not because of a restrictive practice adopted by the Bar." [67]

If these suggestions were implemented it is not thought that they would prove detrimental to the Bar as a whole—on the contrary. They would certainly benefit leaders who would be briefed in far more cases which would make applying for silk less of a gamble than it is at present. This alone might make the profession more attractive to the new entrant taking a long view of his prospects. Further, they would make it easier and more common for solicitors to employ young and relatively untried juniors; at present they are deterred from doing so by the knowledge that they are necessarily committed to brief them at the trial, either on their own, or with a leader paying them two-third's of the latter's fee. The major effect ought therefore to be to spread the available work more evenly over the Bar as a whole and to break down the virtual monopoly of a fashionable few. This would be wholly desirable in the interests of the profession as well as of the public.

Another matter to which the minority refer is that of the absence of a contractual relationship between the barrister and lay client. They cogently ask "whether it is right that amongst all the professions that of a barrister should alone enjoy freedom from liability for negligence?" adding, "on the face of it, it seems to be anomalous that in a county court a client whose advocate is a solicitor has all the rights against the solicitor which a contractual relationship imparts, whereas the client whose advocate is a barrister has no such rights against the barrister." [68] The retention of this anomaly is supported by the majority mainly on the ground that absence of liability is a necessary corollary of the essential rule that a barrister is bound to accept a brief from anyone on payment of a proper fee.[69] With the greatest respect, this argument though superficially plausible, is unsound, for there is no valid reason why the latter

[67] Addendum, para. 10
[68] Addendum, para. 13.
[69] Para. 779.

rule should not be retained even if the former is scrapped. Solicitors under the Legal Aid Scheme are under an obligation to accept retainers in the absence of good reason for refusing, yet normal contractual relationship exists between them and their assisted clients and they are liable for negligence.[70] The contrary rule in the case of barristers is one more example of the anachronisms which encrust litigation and which hinder a new approach to it. It is difficult to see why the Bar bothers to fight for the retention of this one.

Finally, both the majority [71] and the minority [72] suggest that the question of partnerships between barristers is worthy of consideration.[73] As a preliminary step the minority suggest that arrangements should be made whereby a solicitor can go to a set of chambers and ascertain at the outset for what fee both junior and leading counsel are prepared to carry the case through. If this could be instituted it would certainly be a godsend to the litigant.

12. *Distribution of Business in the High Court* [74]

The last section of the final report is devoted to a consideration of the present Divisions of the High Court. Here again the ultimate result is, in essence, "no change"; rather to the surprise of the profession even the Probate, Divorce and Admiralty Division emerges unscathed. The Committee share the general regret at the atrophy of the present Commercial List,[75] but they do not regard the case for the establishment of a combined Admiralty/Commercial Court as sufficiently compelling to merit immediate consideration unless the Royal Commission on Marriage and Divorce recommend that divorce jurisdiction be removed from the Division.[76]

C. Efficacy of Proposals

These then are the major proposals. If they were all implemented (which is hoping for much) would they suffice to render High Court litigation sufficiently cheap and attractive to cure our present ills? The answer, it seems pretty clear, is that they would not.

It is difficult to estimate what the total saving might be expected to be in any one case and the report gives no indication of the views of the Committee. It would, however, probably be fair to say that it would be unlikely to be more than 10 per cent., or perhaps 15 per

[70] And innkeepers and common carriers have no right to refuse custom, yet are under a particularly heavy liability.
[71] Para. 774.
[72] Addendum, para. 12.
[73] "It would give some measure of security to all members of the Bar in the partnership and would enable young men to be paid something in the nature of a salary. It might also lead to a satisfactory system of payment of barristers' clerks . . . ": *ibid.*
[74] Sect. XII.
[75] *Cf.* the *cri de coeur* in *James Shaffer* v. *Findlay, Durham & Brodie* [1953] 1 W.L.R. 106, C.A.
[76] This would be a more radical proposal than anyone expects from the Commission.

cent. when the suggested new procedure is used.[77] The report treats as typical of a "relatively small action" one in which the party-and-party bill of each side totals between £150 and £200 and the solicitor-and-own client bill between £175 and £230.[78] Taking the lowest figures this means that the loser will have to pay £325. Anyone with experience will agree that this is an unusually low figure for a disputed Queen's Bench action, and that in most cases the loser will have to pay at least twice that sum. Is a reduction of 10 per cent. or even 15 per cent. going to make any real difference to the average litigant? Obviously not. If £325 or £650 is beyond his means so, almost certainly, is £293 or £595 (to take the more probable 10 per cent. saving), or £277 or £563 (to take the most optimistic 15 per cent.). Nor, apart from the possibility of fixed dates and of the greater speed inherent in the new procedure, does the report really contain anything to render litigation more attractive to those business men who may be seduced by the lure of arbitration for reasons other than those of expense.

That this is correct seems to be impliedly admitted by the Committee both in their somewhat apologetic introduction to the Final Report and by the detailed attention which they pay (with largely negative results) to the possibility of arbitrarily limiting bills of costs [79]—an unnecessary step if their other recommendations would be effective.

It may perhaps fairly be argued that, even within their terms of reference, the Committee have not gone as far as they might. Certain respects in which they might have been more progressive have been suggested above, and their investigation, detailed though it has been, may not in fact have been as completely exhaustive as they suggest.[80] But still, it is reasonably clear that the Committee are right in saying that not much more, and certainly not enough, can be done without really radical changes. A new approach alone will not do; the mansion itself requires rebuilding.

D. Possible Solutions

Assuming that this is so, what follows? There are, it is submitted, only two alternatives.

The first, to which the legal profession seem to be subconsciously pinning their faith, is that the financial limits of the Legal Aid Scheme will be gradually raised so as to embrace virtually all

[77] Even in new procedure cases the saving could not be much greater than others since "it is at, or in immediate preparation for, the trial that most of the costs are incurred" (Cmd. 8878, para. 22), and the "new procedure" has no direct effect on the trial itself but merely on the early preliminaries.

[78] Cmd. 8878, para. 682.

[79] See section C, para. 10, above.

[80] For example, no one who has conducted a debenture-holders' action will believe that economies are not possible there; nor will anyone who has had to pay money into court or to withdraw it from the court believe that the incredibly cumbersome system could not be streamlined. Neither of these matters seems to have been considered by the Committee.

individuals, leaving unassisted litigation to companies and other wealthy associations. If this were done it would doubtless be possible to retain the present luxury system without serious injustice.

But those who believe that this solution is practicable seem to be living in a fool's paradise. The fact is that the country can no longer afford its luxurious judicial system.[81] While the expense falls on the shoulders of unorganised and unvocal individual litigants, demands for a radical change may be suppressed. But once the burden is assumed by the State it seems too much to hope that this happy state (happy for lawyers) will be allowed to continue; H.M. Treasury is far from unorganised or voiceless and it protects the taxpayer as no one protects the litigant.

This leaves only the second solution, namely a fundamental reorganisation of the machinery of justice involving a modification of the characteristics (or some of them) outlined in Section A of this paper. This is conceded both by the majority in the introduction to the Final Report and, more clearly, by the minority in their Addendum where they call for an inquiry into fusion and decentralisation—without committing themselves to the view that these would solve the problem.

Having said so much it behoves the writer to venture on concrete suggestions for what these changes should be. With some trepidation the following scheme—which here can only be described in the broadest outline—is put forward as the least drastic and painful that will meet the case.

1. Conferment of unlimited jurisdiction on the county courts.[82]
2. Limitation of the original civil jurisdiction of the High Court to cases in which *both* parties agree to the case being heard there.
3. Appeal from the county court only on questions of law (as at present[83]), the costs of a successful appeal being borne by public funds.
4. Abolition of appeal to the House of Lords except when the Attorney-General certifies that a point of law of exceptional public importance is involved, in which case the costs of both parties would be borne by public funds.
5. Abolition of all court fees except where the trial judge orders them to be paid by one party.
6. The trial judge to have an absolute discretion to admit any evidence for what it is worth.

[81] This article was written before I had the pleasure of listening to Lord Cooper's address to the Society of Public Teachers of Law in September, 1953. In this address, which will be published in the forthcoming number of the Society's *Journal*, Lord Cooper expressed much the same view.

[82] Just as the local sheriffs' courts in Scotland normally have. It is, of course, assumed that the Legal Aid Scheme will have been extended to county courts —a long overdue reform.

[83] And contrary to the Committee's recommendations: see above.

7. The trial judge to have a complete discretion to refer any question to a court expert for inquiry and report and to refuse to hear any further expert evidence on this point.

This scheme has been described as " least drastic and painful " but it would be idle to deny that it will be too drastic and painful for some. It is therefore necessary to say a few words in justification and to deal briefly with some of the objections which it will arouse.

In essence the scheme is simplicity itself—the substitution of the county court for the High Court as the primary court of first instance by reversing the present rule that actions outside the normal county court limits must be heard in the High Court unless both parties agree that the county court shall have jurisdiction. One objection to this will be that justice is not administered satisfactorily in the county courts. If this were true it would be a sorry state of affairs for already the county courts deal with the vast numerical majority of civil suits some of them of the utmost importance to the parties. But it is not true. Doubtless the system is not as perfect as in the High Court, but that is not the point. Our major premiss is that some perfection will have to be sacrificed in the interest of economy. And the High Court will still be there if both parties want to resort to it and can afford to do so. This, surely, is the only logical and sensible course? We do not force everyone who wants a square meal to go to the Ritz, but recognise that some will prefer Lyons or the A.B.C., notwithstanding that the cuisine and service may be less superb. Why then, should we force litigants to pay for the luxury of the High Court if they prefer the humbler diet of the county court?

Secondly it will probably be objected that the proposal would destroy the character of the county courts as " poor men's courts." There is a misunderstanding here. Although the Evershed Reports thus describe the county courts,[84] they are in fact nothing of the sort, but " small claims courts " which is a very different matter, for the size of the claim is not necessarily related to the wealth of the parties.[85] The suggested scheme should not change the courts' basic character, but only convert them into the " poor men's courts " which the Evershed Committee apparently believe and wish them to be. By the standard of High Court costs most individuals are poor—and for the few who are not the optional jurisdiction of the High Court would remain. Of the cases at present actually fought out in the High Court, a large proportion are supported on both sides by insurance companies, trade unions and the like, and these bodies would doubtless opt in favour of the

[84] See, for example, Cmd. 7764, para. 4.

[85] If it were otherwise the whole Legal Aid Scheme as at present in operation would be based on a fallacy for it is restricted to the High Court and assumes (rightly) that many litigants there are poor.

High Court. Hence there would not be any substantial transfer from the High Court to the county courts except of those cases in which at present one party is reluctantly forced to settle before the hearing. There is no reason to suppose that the High Court would be stripped of work or that the county courts would lose their character by becoming the scene of expensively run litigation.

Thirdly it will be said that it would require a vast increase in the number of county court judges. This is problematical. A reasonable increase in litigation could be absorbed by the various county courts with virtually no increase in judicial strength. If, as the scheme presupposes, considerably more cases came to trial some further increase would doubtless be needed. But, to quote *The Times*[86] once more, "to have too few judges at any point in the purveying of justice is the falsest of economy." In any event, if the salaries of High Court judges are increased to the extent now suggested it will be possible to have several county court judges for the price of one High Court judge.

Finally it may be argued that the scheme would be to the detriment of the *corpus juris Angliae*. This is believed to be the reverse of the truth. If, as is to be hoped, county court judgments were not reported, the bulk of the law reports would be greatly diminished and they would be restricted to cases with a clear point of law decided on appeal.[87] Nothing could be more beneficial.

The inherent advantages of the scheme are sufficiently obvious. It would provide the decentralisation, which seems vital if cheapness is to be secured,[88] the county court procedure is relatively simple and cheap without similar opportunities for elaborate cost-consuming pleadings and interlocutory applications, and there is already a system of fixed dates, though admittedly not a perfect one. Further the whole atmosphere is different; the tradition is against, not in favour of, running up costs and the "approach" which the Committee want to see in the High Court already exists. Though the procedure is "contentious" the judges are not unaccustomed to assuming much more of an "inquisitorial" role—they have to when the parties are unrepresented—and the rules of evidence are relaxed to a far greater extent. These desirable factors are intended to be enhanced by proposals 6 and 7. The first of these admittedly goes much further than the existing

[86] September 5, 1949.

[87] Plus important High Court cases heard under the optional jurisdiction.

[88] The Committee appear to doubt this because "England is a small country and London is accessible from its remotest parts in the course of a day." Cmd. 8878 para. 27. But this ignores the fact that the cost of travel and hotel accommodation is increasing—nor is travel getting more rapid. Until the Law Courts provide cheap hostel accommodation and a subsidised helicopter service connected to all parts of the country (and the present neo-Gothic architecture hardly lends itself to the construction of a landing station on the roof) the expense caused by bringing all the parties and witnesses to London can hardly be brushed aside.

practice, but little further than the Committee said should be the ultimate aim [89] and which they rejected at present only because they thought it might do more harm than good in the existing atmosphere of High Court litigation.[90] Proposal 7 hardly goes further than to ask for an extended use of powers already vested in the High Court.[91] Solicitors ought, it is true, to be remunerated more adequately than they are under the present County Court Scales but the Committee on County Court Procedure has already proposed that they shall be.[92] This would admittedly increase the expense somewhat but this increase would be offset by the other proposals.

And, of course, solicitors have a right of audience in county courts, so that the proposals afford a means of attaining some of the advantages of fusion. Clearly there is much to be said on both sides on the issue of fusion, but it can hardly be denied that it would enable the cost of a specialist advocate to be avoided in cases where none was needed. And this would be accomplished, without performing a major surgical operation on the unwilling body [93] of the profession, under the proposals outlined above.[94] Doubtless it will be argued that they would be the thin end of the wedge which would ultimately lead to true fusion. If they did so with the goodwill of the profession it might have many advantages both to the profession and the public. Reading the Evershed Report one is struck by the number of fertile proposals which had to be rejected solely or mainly because of the divided profession.[95]

It is probably unnecessary for the purposes of the present discussion to say more about the individual proposals here advocated. Proposals 1 to 3, and 6 and 7 have been dealt with sufficiently to explain their general nature and purpose. As regards proposal 4 (concerning appeals to the House of Lords) it should perhaps be added that it would equate civil and criminal appeals and would have the advantage, over complete abolition, of retaining one supreme tribunal for the whole of the U.K. in which really important

[89] Slightly further, admittedly, for they would apparently have limited the discretion to documentary evidence and were not contemplating the complete abolition of the hearsay and *res gestae* doctrines: but see para. 258.

[90] Paras. 265–271.

[91] R.S.C., Ord. 37A and Ord. 55, r. 19.

[92] Cmd. 7668.

[93] The top half of the body is certainly unwilling, and the writer no longer believes, as he did in his callow youth (see 9 M.L.R. at pp. 221 *et seq.*), that any Government would have the courage to fuse the profession whether its leaders liked it or not.

[94] As a *quid pro quo* the Bar might well be granted an extended right to give advisory opinions without the interposition of a solicitor. There is no doubt that a solicitor sometimes acts as a mere post-office between the client's accountants and counsel.

[95] *e.g.*, " pre-trial " conferences (paras. 217–223), appeals by filing written briefs (para. 574), and limitation of costs on the basis of a proportion of the amount at stake (paras. 693–5).

points of law could be settled at greater leisure than is possible in the Court of Appeal. Proposal 5 (abolition of court fees) was, of course, touched on in the second interim report,[96] but not considered fully as it was beyond the Committee's terms of reference. Of greater force, perhaps, than Sir Alan Herbert's argument that such fees are contrary to Magna Carta, is the submission that justice is a public service which should be provided by the State out of general revenue and not out of the pockets of individual litigants.[97] On the other hand, frivolous litigation should not be encouraged or subsidised; hence the proposal that the trial judge should have a discretion to order payment of fees.

Whether the scheme outlined would attract back into the fold the commercial men who at present resort to arbitration is perhaps doubtful. The habit of inserting an arbitration clause in commercial agreements has become ingrained and it would take a lot to produce both the needful change of heart and of standard forms of contract. On the other hand the optional High Court jurisdiction would provide an alternative in which the business-man could be sure of receiving greater personal attention than at present and greater assurance that a judge of commercial experience would be available. In time this might lead to a revival of the former glories of the Commercial Court.

E. Conclusions

This paper may be summed up in the following conclusions:

1. High Court procedure aims at perfection irrespective of cost.
2. The cost is greater than litigants or the country can bear.
3. The recommendations of the Evershed Committee, even if implemented in full, would not provide more than a partial alleviation.
4. The only solution is to change some of its basic characteristics even if this results in some sacrifice of perfection.
5. The best way of accomplishing this would be to confer unlimited jurisdiction on the county courts and to introduce certain ancillary changes briefly explained in section D.

L. C. B. Gower *

[96] Cmd. 8176, pt. V.

[97] The figures given in the interim report "seem to show that . . . the whole of the expense of the administration of justice, including the salaries and pensions of the judge, so far as these are attributable to civil litigation, is in fact substantially covered by the fees received." *Ibid.* para. 144.

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THE RELATIONSHIP OF PRINCIPAL AND AGENT

THE law governing the relations between principals and their agents has been neglected by most of the writers who have analysed and restated English law, and, unfortunately, this subject has not been illuminated by any comprehensive review by the English judges in an appellate court. The incidents and the character of the legal relation of principal and agent have long been obscured by the use of the fictions that principal and agent are one person and *qui facit per alium facit per se* in the commentaries on agency law. The majority of the text-writers who have attempted to clarify this subject have been content to state the law of the relation in the form of a catalogue of the main incidents—the rights, duties, powers and liabilities of the parties *inter se*.[1] As to the character of the relation, it has been variously described as a special kind of contract,[2] a fiduciary relation,[3] and a grant of authority.[4] In this paper it is proposed to examine afresh the main rules of English law [5] governing the relation of principal and agent, to determine the essential element in this relation, and to restate the incidents of the relation in terms of this essential element.

I. AGENCY AND CONTRACT

A view as to the nature of the relation of principal and agent which is still widely held is that it is essentially contractual.[6] It has been

[1] Powell, *Law of Agency* (1952), pp. 238–301; Hanbury, *Principles of Agency* (1952), pp. 48–84; *Bowstead on Agency*, 11th ed., arts. 43–80; Wilshere, *Outline of the Law of Agency*, pp. 34–59; Halsbury's *Laws of England*, 3rd ed., Vol. I, pp. 181–207; *Chitty on Contracts*, 20th ed., pp. 1088–1097; *Anson on Contracts*, 20th ed., pp. 395–401.

[2] *e.g.*, *Pollock on Contract*, 13th ed., p. 46.

[3] *e.g.*, Halsbury's *Laws of England*, 3rd ed., Vol. I, p. 182.

[4] *e.g.*, Salmond and Winfield, *Law of Contracts*, p. 340.

[5] The law governing the relation of principal and agent in American and Canadian jurisdictions has been thoroughly examined by American and Canadian writers. The following are the leading contributions on this subject:—Seavey, "The Rationale of Agency," 29 Yale L.J. 859; American Law Institute's *Restatement of the Law of Agency* (1933), §§ 12–14, 376–528; Mechem, *Law of Agency*, 2nd ed., §§ 25–78, 1188–1353, 1507–1705; Williston, *Law of Contracts*, revised ed., §§ 274, 1012–1030A; Falconbridge, "Law of Agency," 17 Can.Bar Rev. 248; Abbott, "Of the Nature of Agency," 9 Harv. L.R. 507; *Story on Agency*, 7th ed. (1869), §§ 1–4, 182–217, 323–390. These writers have based their conclusions for the most part on cases decided in American and Canadian courts. However, the materials on which this paper is based are exclusively cases decided in the English courts.

[6] Cheshire and Fifoot, *Law of Contract*, 3rd ed., p. 373; *Pollock on Contract*, 13th ed., p. 46; *Chitty on Contracts*, 20th ed., p. 1088; Salmond and Winfield, *Law of Contracts*, p. 340; Halsbury's *Laws of England*, 3rd ed., Vol. I, p. 181: *cf.* Mechem, *Law of Agency*, 2nd ed., §§ 33–4.

assumed that the relation is created only when there exists a contract between the parties, and that the many well-known incidents of agency are express or implied terms in such a contract. Many lawyers subscribed to this view in the nineteenth century, and their assumption that the relation was contractual may have been based on no sounder foundation than the fact that, before the Common Law Procedure Act, the normal remedies at common law for the enforcement of duties between principal and agent were the various species of *assumpsit*. In the late nineteenth and early twentieth centuries, when it was fashionable to press all species of civil liability at common law into either the category of contract or tort, it is understandable that the agency relation should have been classed as contractual rather than tortious, as in many particulars it has an affinity with contract. An agency is usually founded on an agreement between the principal and agent. Consideration, sufficient to convert this agreement into a contract binding each party, can be found in most cases. Besides, an agency is not infrequently constituted in writing under seal, when an agent is appointed by power of attorney. Further, in a great many instances, breach of agency duties by either party will give rise to liability for damages for breach of contract.

Although there are undoubtedly these points in common between most agencies and contracts it does not follow that every agency is a contract. A close examination of the law governing the relation between principal and agent reveals several points of divergence. For instance, while it is axiomatic that a simple contractual relation rests upon agreement between the parties to specific terms, nevertheless the relation of agency may exist between P and A in respect of a particular enterprise upon which P and A have never agreed, as in the case where A, a carrier of goods belonging to P, acts as P's agent without his authority in circumstances amounting to commercial necessity.[7] Again, consideration still remains a cardinal necessity in the formation of a simple contract under English law; yet in cases where A has acted gratuitously as the agent of P, and it is impossible to find consideration on P's part without resort to sophistries, the courts have not hesitated to recognise the relation of principal and agent as existing between P and A to attach to A normal agency duties.[8] Further, although an agreement between two persons which is collateral to an illegal transaction is tainted with illegality and does not constitute a valid contract, there is authority for the proposition that when P employs A as agent to effect an illegal transaction and A receives property under that

[7] *e.g.*, *The Argos* (*Cargo ex*), *Gaudet* v. *Brown* (1873) L.R. 5 P.C. 134; *Great Northern Ry.* v. *Swaffield* (1874) L.R. 9 Ex. 132.

[8] *Wilkinson* v. *Coverdale* (1793) 1 Esp. 75; *Wallace* v. *Tellfair*, unreported but cited in the last-mentioned report; *Massey* v. *Banner* (1820) 1 Jac. & W. 241; *Donaldson* v. *Haldane* (1840) 7 Cl. & Fin. 762; *Turnbull* v. *Garden* (1869) 9 Bar Rep. 219.

transaction for P then A is bound to hand over that property to P—a normal agency duty, which cannot properly be classified as contractual.[9] Also, it is elementary that a party to a contract cannot repudiate the relation without incurring liability, unless the contract happens to be voidable at his option: yet it is well established in the law of agency that, within limits, a principal has the power to terminate the relation at will with impunity.[10] Finally, contractual relations and agency relations are not subject to the same rules concerning limitation of actions; defaulting agents, long after the expiry of the statutory period of limitation of actions, have pleaded the statute in vain in a number of cases, notably *Burdick* v. *Garrick*.[11]

These points of divergence between the law of agency and the law of contracts reveal that the common assumption that agency is essentially contractual is unsound. But still it is obvious that there exists a close connection between the two doctrines. The connection may be expressed in this way: it is true that in almost all cases a contract accompanies an agency, but there may be a complete agency without a contract.[12] This point, that an agency can exist apart from contract, has been taken by very few judges,[13] but in recent years it has been emphasised by several text-writers.[14] The exact connection between agency and contract may be summed up in the following propositions:

First: The relation of principal and agent may be created in various ways, as when P expressly or by implication authorises A to act in certain transactions, and when P ratifies A's unauthorised acts performed on P's behalf, and when A acts for P under circumstances of necessity [15]—irrespective of whether there is a contract created or subsisting between P and A to the same effect.

[9] *Tenant* v. *Elliott* (1797) 1 B. & P. 3. Approved by Brett M.R. in *Bridger* v. *Savage* (1885) 15 Q.B.D. 363, at p. 366.

[10] "An authority is, in its nature, revocable by the donor of it," *per* Wilde C.J. in *Smart* v. *Sandars* (No. 2) (1848) 5 C.B. 895, at p. 916, quoting from *Vynior's Case* (1609) 8 Co.Rep. 82a; *Luxor* v. *Cooper* [1941] A.C. 108 is a striking example.

[11] (1870) L.R. 5 Ch. 233; also *North American Land & Timber Co.* v. *Watkins* [1904] 1 Ch. 242, 2 Ch. 233; see Preston & Newsom, *Limitation of Actions*, 2nd ed., pp. 162–4.

[12] The phraseology is that used by Lord Coleridge C.J. in *R.* v. *McDonald* (1885) 15 Q.B.D. 323, at p. 326, where he took pains to distinguish between bailments and contracts.

[13] Bowen L.J. appears to have regarded agency as distinct from contract: see *Read* v. *Anderson* (1884) 13 Q.B.D. 779, at p. 782.

[14] Powell, *Law of Agency*, p. 245; Salmond & Williams, *Law of Contracts*, p. 393; Winfield, *Province of the Law of Tort*, p. 138, and *Law of Quasi-Contracts*, p. 89. *Cf.* Seavey, 29 Yale L.J. 859, at p. 863; Williston, *Law of Contracts*, revised ed., § 274; Falconbridge, 17 Can.Bar Rev. 248, at p. 251; *Restatement of Agency*, §§ 16, 26a and introduction to Chap. 13.

[15] The interesting question arises here whether the relation of principal and agent and the incidents of that relation obtain between an apparent principal and an apparent agent in cases of apparent authority, when the former has not in fact authorised the latter to act for him. No English case directly

Second: Whenever the relation of agency is created there attaches prima facie to each party a number of duties, liabilities and disabilities—the normal incidents of agency.

Third: Besides the relation of principal and agent which obtains between two persons there may be, in addition, a contract *inter se*.

Fourth: When there is such a contract its express or implied terms may vary or exclude the normal incidents of agency.

Fifth: When there is such a contract many of the normal incidents of agency may be incorporated into the contract as express or implied terms.

Sixth: When there is such a contract its additional terms, express or implied, may be infinitely various. But three species of terms which are common in agency contracts may be specially mentioned.

1. If A expressly promises to carry out his function as an agent, then A incurs a contractual duty to that effect.[16]
2. If P expressly promises to pay his agent for his services (and the promise may be, to pay in any event, or, to pay only on the happening of specified events[17]) then P creates for himself a contractual duty to remunerate A.
3. If there exists a mutual understanding that A's services are to be paid for, a term to this effect will be implied, and P will be under a contractual duty to pay A reasonable remuneration.[18]

decides this question, and the problem has been ignored by most writers on agency. The following answers are submitted:

(1) The overwhelming weight of English authorities favours the view that the doctrine of apparent authority rests upon the principle of estoppel: *Freeman* v. *Cooke* (1848) 2 Exch. 654, at pp. 662–3, *per* Parke B.; *Scarf* v. *Jardine* (1882) 7 App.Cas. 345, at p. 349, *per* Lord Selborne L.C.; *Miles* v. *McIlwraith* (1883) 8 App.Cas. 120, at p. 133, *per* Lord Blackburn; *Rama Corporation, Ltd.* v. *Proved Tin and General Investments, Ltd.* [1952] 1 All E.R. 554, at p. 556, *per* Slade J. Accordingly, in cases of apparent authority, a third party X who has relied on the appearance of authority as between P and A can estop P denying that he authorised A to be his agent. But this principle of estoppel can only be invoked by the duped third party X. It does not operate as between P and A when neither has relied on the other's representations. Thus the normal relation of principal and agent does not exist *inter se*.

(2) But if A has falsely assumed the role of agent, by acting without authority, or beyond the scope of his authority, or in defiance of orders, and P incurs liability to X in consequence, it is submitted that A should be bound by the normal duties of an agent, without enjoying the normal rights of an agent, as "an agent *de son tort*," on the analogy of a trustee *de son tort*. Dicta of Lord Selborne in *Lyell* v. *Kennedy* (1889) 14 App.Cas. 437, at pp. 457–460, and of Anderson J. in *Gawton* v. *Ld. Daeres* (1590) 1 Leon. 219, at p. 219, support this contention. *Cf. Restatement of Agency*, § 15d.

[16] *e.g.*, *Turpin* v. *Bilton* (1843) 5 M. & G. 455; *Bertram, Armstrong & Co.* v. *Godfray* (1830) 1 Knapp 381.

[17] *e.g.*, *Luxor* v. *Cooper* [1941] A.C. 108; *Boots* v. *Christopher* [1951] 2 All E.R. 1045.

[18] *e.g.*, *Way* v. *Latilla* [1937] 3 All E.R. 759. But such a term is not invariably implied in every case of agency where there is no express term concerning remuneration: *Reeve* v. *Reeve* (1858) 1 F. & F. 280, *per* Martin B.; *Roberts* v. *Smith* (1859) 4 H. & N. 315.

These particular obligations only arise by way of contract, and are supernumerary to the normal incidents of agency.

These propositions assume one axiom which needs to be substantiated, namely that the normal incidents of agency arise not *ex contractu* but *ex lege*. To prove this axiom it will be necessary to discuss the connection between agency and the doctrines of fiduciary relations, quasi-contract, and tort.

II. Agency and the Doctrine of Fiduciary Relations

Agency has often been described as a fiduciary relation.[19] Historically, the doctrine of fiduciary relations is an extension of the law of trusts. There is abundant evidence that during the eighteenth and nineteenth centuries the Court of Chancery assumed jurisdiction over cases in which a principal reposed confidence in his agent, and the agent abused that confidence.[20] In such cases the court applied to the agency relation some of the principles originally developed to control the trust relation. Many of the duties and disabilities which normally attach to an agent in the modern law are the legacy of this jurisdiction. McCardie J. has summed up this development:—"The position of principal and agent gives rise to particular and onerous duties on the part of the agent, and the high standard of conduct required from him springs from the fiduciary relationship between his employer and himself. His position is confidential. It readily lends itself to abuse. A strict and salutary rule is required to meet the special situation. The rules of English law as they now exist spring from the strictness originally required by Courts of Equity in cases where the fiduciary relationship exists."[21] It is only proposed here to mention some of the principles of equity which have been applied in agency cases, and to notice some of the particular incidents of agency which have emerged in the process, to support the contention that the normal incidents of agency arise by operation of law.

The equitable maxim, that no person in a position of trust can be allowed to put himself in a situation in which his interest and his

[19] *Re Hallett's Estate* (1880) 13 Ch.D. 696, at p. 709, *per* Jessel M.R.; *Regal (Hastings), Ltd.* v. *Gulliver* [1942] 1 All E.R. 378, at p. 392, *per* Lord Wright; *Nordisk Insulinlaboratorium* v. *C. L. Bencard (1934), Ltd.* [1952] 2 All E.R. 1040, at p. 1042, *per* Vaisey J.; *Snell on Equity*, 23rd ed., p. 173; Powell, *Law of Agency*, p. 26; *Bowstead on Agency*, 11th ed., p. 85; Salmond & Winfield, *Law of Contracts*, p. 262. *Cf. Restatement of Agency*, § 13; Seavey, 29 Yale L.J., p. 863.

[20] *Burdett* v. *Willett* (1708) 2 Vern. 628; *White* v. *Lincoln* (1803) 8 Ves. 363; *Pearse* v. *Green* (1819) 1 Jac. & W. 135; *Lupton* v. *White* (1808) 15 Ves. 432; *Massey* v. *Banner* (1820) 1 Jac. & W. 241; *Lees* v. *Nuttall* (1829) 1 Russ. & M. 53; (1834) 2 Myl. & K. 819; *Rothschild* v. *Brookman* (1831) 2 Dow. & Cl. 188; *Austin* v. *Chambers* (1837–8) 6 Cl. & F. 1; *Clarke* v. *Tipping* (1846) 9 Beav. 284; *Bentley* v. *Craven* (1853) 18 Beav. 75; *Gray* v. *Haig* (1854–5) 20 Beav. 219; *Turnbull* v. *Garden* (1869) 9 Bar Rep. 219; *Burdick* v. *Garrick* (1870) L.R. 5 Ch. 233; *Parker* v. *McKenna* (1874) L.R. 10 Ch. 96.

[21] *Armstrong* v. *Jackson* [1917] 2 K.B. 822, at p. 826.

duty would be in conflict, has been applied in many cases of agency to prevent an agent from putting himself in a situation in which his private interests would be in conflict with his principal's interests, and accordingly the principal's interests would be likely to suffer. This principle, in the context of agency, has been affirmed by Lord Cairns L.C. in the Court of Appeal in Chancery :—" Now the rule of this court . . . as to agents is not a technical or arbitrary rule. It is a rule founded on the highest and truest principles of morality. No man can in this court, acting as an agent, be allowed to put himself into a position in which his interest and his duty will be in conflict." [22] One specific incident of agency which is derived from this principle is the duty of an agent to make no profit out of any transaction connected with his agency, without the approval of his principal.[23] If an agent does make such a secret profit he is liable in equity to account to his principal for the amount of the profit and interest. To this extent a defaulting agent stands in the same position as a defaulting trustee.[24] But the courts have not pressed the analogy between an agent and a trustee to the extent of allowing a principal to follow his agent's ill-gotten gains into other property into which it has been converted.[25]

Another incident of agency which springs from this same equitable principle is the duty of an agent to make a full disclosure of any personal interest which he may have in the transactions he has the power to effect as agent. *Bentley* v. *Craven* [26] illustrates this duty, and brings out its equitable origin. Four partners established a sugar-refining business. As one of them, the defendant, had experience in buying sugar, the others authorised him to buy sugar for the firm. The defendant sold to the firm sugar which he owned himself, without informing his partners that he was selling to them his own goods, and made a profit on the transactions. The other partners successfully claimed the amount of this profit from the defendant. The judgment of Romilly M.R. is illuminating :—" This appears to me to be founded on the first principles of equity. . . . Two principles with relation to the doctrine of principal and agent have been recognised from the earliest times. One is, that an agent employed to purchase cannot legally buy his own goods for his principal; neither can an agent employed to sell, himself purchase the goods of his principal. If he should do so, and thereby make a profit, the principal may either repudiate the transaction altogether, or, adopting it, may claim for himself the benefit made by his agent. The same principle is

[22] *Parker* v. *McKenna* (1874) L.R. 10 Ch. 96, at p. 118.
[23] *e.g.*, *Parker* v. *McKenna; Boston Deep Sea Fishing and Ice Co.* v. *Ansell* (1888) 39 Ch.D. 339.
[24] *Cf. Williams* v. *Barton* [1927] 2 Ch. 9.
[25] *Lister* v. *Stubbs* (1890) 45 Ch.D. 1.
[26] (1853) 18 Beav. 75.

applicable to a great many other relations, as to that of trustee and *cestui que trust*. . . ." [27]

An agent who has received goods or money from or for his principal has often been treated in courts of equity as if he were a trustee of that property for his principal. This practice has been described by Lord Cottenham L.C. :—" So it is with regard to an agent dealing with any property; he obtains no interest himself in the subject-matter beyond his remuneration; he is dealing throughout for another, and though he is not a trustee according to the strict technical meaning of the word, he is *quasi* a trustee for that particular transaction for which he is engaged; and therefore in these cases the courts of equity have assumed jurisdiction." [28] Out of this practice there has emerged a rule, which is a normal incident of agency, that an agent who receives goods or money from or for his principal is bound to keep that property separate from his own and that of others. For certain purposes the agent is treated as if trustee of that property : if the agent mixes the principal's property with his own, then the principal can exert a charge on the whole mixture [29]; if the agent converts his principal's property into money or other goods the principal can follow the property in the agent's hands into its new form, provided that it is identifiable [30]; the principal can sue for the recovery of the property despite the expiry of the statutory period of limitation [31]; and in the event of the agent's bankruptcy the principal's property is not part of the agent's general assets.[32]

However there is one set of circumstances in which an agent becomes a trustee of property according to the technical meaning of the word. *Lees* v. *Nuttall* [33] is an authority for the proposition that an agent who is authorised to purchase property for his principal, and in fact purchases the property in his own name, becomes a trustee of that property for his principal.[34]

The maxim *delegatus non potest delegare* has been applied both to trustees and to agents, for the same reason. Agents and trustees are generally chosen because the principal or the person creating the trust has special confidence in the particular person selected. If this person could employ a substitute it would be an abuse of

[27] *Ibid.*, at p. 76.
[28] *Foley* v. *Hill* (1848) 2 H.L.C. 28, at pp. 35–6.
[29] *Lupton* v. *White* (1808) 15 Ves. 432.
[30] *Re Hallett's Estate* (1880) 13 Ch.D. 696; Brodhurst, " Following Property in the hands of an Agent," 14 L.Q.R. 272.
[31] *Burdick* v. *Garrick* (1870) L.R. 5 Ch. 233.
[32] *Burdett* v. *Willett* (1708) 2 Vern. 628.
[33] (1829) 1 Russ. & M. 53; (1834) 2 Myl. & K. 819.
[34] Lord Brougham L.C. affirmed the decision on appeal without giving any reasons. *Lees* v. *Nuttall* has been approved by the House of Lords in *Austin* v. *Chambers* (1837–8) 6 Cl. & F. 1, and has been followed more recently in *Longfield Parish Council* v. *Robson* (1913) 29 T.L.R. 357.

this confidence.[35] This disability to delegate his office which normally attaches to an agent would appear to be another rule of agency law which springs from the fiduciary character of the relation. Of course, when the principal expressly or impliedly authorises his agent to appoint a substitute, this disability is removed.

It is pertinent to this inquiry as to the nature of the relation of principal and agent to ascertain the basis on which courts of equity enforced these duties and disabilities against agents. Were these duties enforced as contractual obligations, or as obligations imposed by law? An examination of the judgments in the leading Chancery cases[36] in the formative period of this branch of the law leaves one in no doubt as to the answer. In these cases the judges themselves did not pretend to be giving effect to what they might presume to have been the common intention of the parties in the particular case, nor did they seek for the elements of a valid contract between the parties before enforcing these rules. On the contrary, the judges *imposed* these duties and disabilities on agents generally.[37] An agent who had been entrusted with the means of altering his principal's rights, as by contracting or by transferring or receiving property for him, and who thus held powers on his principal's behalf, was subjected to rules of equity to prevent him from abusing these powers. The agent who had been entrusted with legal powers was treated on the same basis as the trustee who had been entrusted with legal rights. Only if it happens in a particular case of agency that the parties expressly or tacitly agree on these very duties, and there exists a contract between them, do these incidents acquire the character of contractual terms. However, if there is a contract and the parties indicate, by the express or implied terms of their bargain, that they intend their relations to be governed by different rules, then these general equitable rules are excluded.

Yet it is not every agent who is in a fiduciary position *vis-à-vis* his principal.[38] For example, if P appoints A to be his agent merely to sign a memorandum and places no particular trust in A, the doctrine of fiduciary relations and the incidents of agency which

[35] *Cf.* Thesiger L.J. in *De Bussche* v. *Alt* (1878) 8 Ch.D. 286, at p. 310, and Bowen L.J. in *Speight* v. *Gaunt* (1883) 22 Ch.D. 727, at pp. 762–3.

[36] See note 20.

[37] The following passage from the judgment of Romilly M.R. in *Gray* v. *Haig* (1854–5) 20 Beav. 219, at pp. 238–9, is representative: "It cannot be too generally known or understood, amongst all persons dealing with each other in the character of principal and agent, how severely this court deals with any irregularities on the part of the agent, how strictly it requires that he who is the person trusted shall act, in all matters relating to such agency, and how imperative it is upon him to preserve correct accounts. . . ."

[38] *Piddocke* v. *Burt* [1894] 1 Ch. 343, at p. 346, *per* Chitty J.; Halsbury's *Laws of England*, 2nd ed., Vol. XIII, p. 196, note (*p*). *Cf. Restatement of Agency*, § 13, where it is asserted that every agent is a fiduciary.

derive from this equitable doctrine would not apply.[39] Nor indeed are they necessary for the protection of the principal's interests. These are sufficiently safeguarded by the common law obligations of agency, which fall to be discussed next. Thus the fiduciary element in agency, though the key to much of the law governing this relation, is not the essential element in the relation.

III. Agency and Quasi-Contract

For centuries the common law judges have recognised that an agent who receives money on behalf of his principal is under an obligation to hand over that money to his principal on demand. In the Middle Ages breach of this obligation by bailiffs or receivers rendered them liable to an action of account.[40] Later the more advantageous remedy at common law was an action of *indebitatus assumpsit*, on a count for money had and received by the defendant to the plaintiff's use. Although the forms of action have gone the appropriate remedy for a principal whose agent refuses to hand over money belonging to the principal is still described as an action for money had and received to the plaintiff's use.[41] These actions might be brought to enforce a true contractual obligation, founded on agreement to that effect between principal and agent. Yet it is clear that in certain circumstances these actions lay to enforce such an obligation even when there was no valid contract between principal and agent, for example where the agency agreement was tainted with the illegality of the main transaction between principal and third party.[42] In these circumstances the obligation attaching to the agent is imposed by law, irrespective of agreement, and may properly be classified as quasi-contractual.[43]

The common law courts, as well as courts of equity, recognised the obligation of an agent to make no profit out of his agency without the approval of his principal. Breach of this obligation formerly gave rise to liability to an action of *indebitatus assumpsit* for money had and received to the plaintiff's use, besides the equitable remedy for an account. The question which is most relevant to this inquiry into the nature of agency is whether this obligation arose by way of contract or by operation of law. The *locus classicus* on this point is a passage from the judgment of Bowen L.J. in the leading case, *Boston Deep Sea Fishing and Ice Co.* v. *Ansell*[44]: "It is true that money which is sought to be recovered must be money had and received by the agent for the principal's use; . . . the use arises from the relation between the principal and the agent himself. It is

[39] *e.g.*, *Re Hindmarsh* (1860) 1 Drew. & Sm. 129.
[40] *Hautun* v. *Preston* (1232) Bracton's Note-Book, Plea 859.
[41] *e.g.*, *Blaustein* v. *Malz, Mitchell & Co.* [1937] 2 K.B. 142.
[42] *Tenant* v. *Elliott* (1797) 1 B. & P. 3; *Farmer* v. *Russell* (1798) 1 B. & P. 296.
[43] Jackson, *History of Quasi-Contract*, pp. 115–6; Winfield, *Province of the Law of Tort*, p. 166, and *Law of Quasi-Contracts*, p. 89.
[44] (1888) 39 Ch.D. 339, at p. 367. This dictum was cited with approval recently by Lord Porter in *Reading* v. *Att.-Gen.* [1951] A.C. 507, at p. 515.

because it is contrary to equity that the agent or the servant should retain money so received without the knowledge of the master. Then the law implies a use, that is to say, there is an implied contract, if you put it as a legal proposition . . . as between the principal and the agent that the agent should pay it over . . ." In this context it is clear that the "implied use" and the "implied contract" are legal fictions. The duty is imposed on the agent by the law; it may be called a legal or an equitable obligation, depending on the remedy the principal selects. Liability may be classified as quasi-contractual [45] or equitable accordingly.[46]

It is not only the agent on whom common law obligations are imposed. The principal himself is subject to one well-established obligation, namely, he is bound to indemnify his agent against such losses and liabilities as the agent suffers in the course of his agency. The appropriate remedy is an action for money paid by the plaintiff to the defendant's use. Occasionally this obligation is created by an express term in a contract of agency. More often it operates as a contractual obligation arising out of an implied term in such a contract. Yet such an obligation binds a principal even in cases in which there is no such express or implied term in a contract between him and his agent. For example, in cases of agency of necessity an agent who necessarily incurs expenses or liabilities in exercising his extra-ordinary powers is entitled to be indemnified by his principal.[47] This obligation is not peculiar to these rare cases of agency, but is an instance of a general principle: "Where the plaintiff has been compelled by law to pay, or, being compellable by law, has paid money which the defendant was ultimately liable to pay, so that the latter obtains the benefit of the payment by the discharge of his liability; under such circumstances the defendant is held indebted to the plaintiff in the amount" [48]—a principle quoted and acted upon by Lord Wright in *Brook's Wharf* v. *Goodman*.[49] In the latter case Lord Wright clarified the basis on which this obligation rests; avoiding the terms "implied contract" and "constructive contract," he asserted "The obligation is imposed by the court simply under the circumstances of the case and on what the court decides is just and reasonable, having regard to the relationship of the parties. It is a debt or obligation constituted by the act of the law, apart from any consent or intention of the parties

[45] Winfield, *Province of the Law of Tort*, pp. 166–7, and *Law of Quasi-Contracts*, p. 89.

[46] In *Reading* v. *The King* [1948] 2 K.B. 268, at p. 275. Denning J. (as he then was) transcended the old boundaries and classified this liability as belonging to the "category known as restitution."

[47] *Notara* v. *Henderson* (1872) L.R. 7 Q.B. 225, at p. 233; *The Argos (Cargo ex) Gaudet* v. *Brown* (1873) L.R. 5 P.C. 134, at pp. 164–5; *Great Northern Ry.* v. *Swaffield* (1874) L.R. 9 Exch. 132, at pp. 136 and 138.

[48] Originally stated in *Leake on Contracts*, and eventually adopted by Cockburn C.J. in *Moule* v. *Garrett*, L.R. 7 Ex. 101, at p. 104.

[49] [1937] 1 K.B 534.

or any privity of contract." [50] In short the duty of a principal to indemnify his agent may be quasi-contractual.[51]

IV. Agency and Tort

An agent who acts gratuitously on behalf of his principal is bound to use reasonable care; failure to do so renders him liable to an action for damages.[52] This liability is not peculiar to agency, but is an instance of the long-established principle of the law of torts, that while a volunteer cannot be compelled to carry out his promise made to another, yet if he does perform it so carelessly as to injure that other person he is liable to an action for damages.[53] It is accordingly a species of the tort of negligence. However, when it happens that there is a contract of agency, this duty to use reasonable care is generally incorporated into the contract as an implied term. Thus in the vast majority of cases of agency the duty operates as a contractual obligation.[54]

An agent who holds goods or land on behalf of his principal must hand over such property to him on demand; otherwise he is liable in tort for conversion, or to an action for the recovery of land. The rules, that the possession of the agent is the possession of the principal so that the principal's title is not extinguished by lapse of time when the property is in the agent's hands,[55] and that an agent may not dispute the title of his principal,[56] are rules of law imposed on agents to protect their principals' interests, and are not derived from particular agreements between principals and agents.

V. The Nature of Agency

This examination of agency law so far has disclosed substantial grounds for the assumption that the normal incidents of the agency relation arise primarily by operation of law. The various duties and disabilities noted which normally attach to principal and agent were formerly enjoined on the parties, to a large extent by courts

[50] *Ibid.*, at p. 545.
[51] A. T. Denning, 55 L.Q.R., at p. 64.
[52] *Wilkinson* v. *Coverdale* (1793) 1 Esp. 75; *Donaldson* v. *Haldane* (1840) 7 Cl. & Fin. 762.
[53] *The Carpenter's Case* (1409) Y.B. 11 Hen. IV. f. 33, pl. 60; *Coggs* v. *Bernard* (1703) 2 Ld.Raym. 909, at p. 918, *per* Holt C.J.; *Elsee* v. *Gatward* (1793) 5 T.R. 143, at p. 150, *per* Ashurst J.; *Beal* v. *S. Devon Ry.* (1864) 3 H. & C. 337, at p. 341, *per* Crompton J., for the Court of Exchequer Chamber.
[54] *e.g.*, *Otter* v. *Church, Adams, Tatham & Co.* [1953] 1 Ch. 280; *Groom* v. *Crocker* [1939] 1 K.B. 194. In the latter case Scott L.J., at p. 222, went so far as to assert that no such common law duty attached to a solicitor except under contract, an extreme view which can only be maintained in the teeth of the authorities cited in notes 52 and 53. The opinion of Lord Haldane L.C. in *Nocton* v. *Ashburton* [1914] A.C. 932, at p. 956, to the effect that a breach of duty to use reasonable care on the part of a solicitor gave rise to *either* contractual *or* tortious liability was preferred by Upjohn J. in *Otter's Case*.
[55] *Lyell* v. *Kennedy* (1889) 14 App.Cas. 437.
[56] *Dixon* v. *Hamond* (1819) 2 B. & Ald. 310.

of equity under the doctrine of fiduciary relations, and to a lesser extent by courts of common law under the doctrines of quasi-contract and tort. Nowadays we can regard these incidents as an amalgam of rules imposed on the parties by law. But this discussion of the connection between agency and the doctrines of fiduciary relations, quasi-contract and tort has drawn attention only to the technical legal doctrines employed by the judges in working out the detailed rules controlling the relation of principal and agent. It has not provided the answer to the cardinal question —why the judges have invoked these doctrines. It remains therefore to attempt to state the essence of the relation of agency, and to explain why these incidental rules have been evolved.

A useful line of investigation is to seek the essential characteristic of agents. The term "agent" is used in ordinary speech to describe any person who acts on behalf of another. But the term "agent" in law certainly has a more restricted meaning. A legal agent has often been defined in terms which denote the whole range of persons who act for and *with the authority* of others,[57] and the judges have often used the term loosely with this denotation.[58] But the decided cases, in which the question whether a given person was an agent *stricto sensu* has been at issue, indicate that even these definitions are too wide. For example, in *Foley* v. *Hill*[59] the question came before the House of Lords whether a banker who simply received moneys from his client and credited them to the client's account was the agent of his client. It was held that in such cases a banker is not an agent, but only a debtor of his client. Yet the man in the street would readily agree that a banker who takes his money and credits it to his account, acts on his behalf and with his authority. In this case Lord Brougham drew a valuable distinction between case (a) where a banker simply receives money from his client on condition of paying it back when asked for, and case (b) where the banker receives, say, exchequer bills from his client, and the banker undertakes to receive interest on them, or to negotiate them and to credit the proceeds to the client's account : only in case (b) is the banker the agent of the client.[60] The distinction is surely that only in case (b) has the banker the ability to alter the client's legal relations with others. Further, in *Towle & Co.* v. *White*,[61] the question came before the House of Lords whether N was an agent of T on the following facts : T supplied N with goods along with a price-list ; N was to dispose of the goods to customers if he could ; N was not obliged to pay for the goods unless he disposed of them ; N was to return a

[57] *e.g.*, in the first ten editions of *Bowstead on Agency* an agent is defined as "a person having express or implied authority to represent or act on behalf of another person." *Cf.* Halsbury's *Laws of England*, 3rd ed., Vol. I, p. 145.
[58] *e.g.*, *Beal* v. *S. Devon Ry.* (1864) 3 H. & C. 337, at p. 341, *per* Crompton J.
[59] (1848) 2 H.L.C. 28.
[60] *Ibid.*, at p. 44.
[61] (1873) 29 L.T. 78, affirming *Re Nevill, ex p. White* (1871) 6 Ch.App. 397.

monthly account of sales actually made, and to pay for the goods at the price-list rates; N in fact had the goods dyed and sold them to customers at his own price, without informing T of the names of the customers. Lord Selborne L.C. approved of the following tests as to whether an agency existed : Would T be liable in contract to the ultimate purchaser, X? Would T be competent to sue the ultimate purchaser, X? Could the persons whom N employed to dye the goods sue T for costs? Since the answer to all the tests was "No," it was held that N was not the agent of T, but a purchaser from T.[62] Lord Selborne's tests come to this : had N the power to alter T's legal relations with other persons? If so, he is an agent. These authorities point to the essential characteristic of an agent.

The essential characteristic of an agent is that he is invested with a legal power to alter his principal's legal relations with third persons [63] : the principal is under a correlative liability to have his legal relations altered. It is submitted that this power-liability relation is the essence of the relationship of principal and agent. The rules which normally attach to the parties, the normal incidents of the relation, are ancillary to this power-liability relation. To satisfy principals' claims in a myriad of cases the judges have imposed on agents certain rules constituting safeguards against the abuse of their powers. To satisfy agents' claims for reimbursement the judges have granted certain rights to agents. But the parties, the best judges of their own interests, may exclude these normal incidents of the relation by their agreement.

[62] *Ibid.*, at p. 79.

[63] The theory that the essential characteristic of an agent is that he holds a power to alter his principal's legal relations with others was advanced first by Hohfeld: see *Fundamental Legal Conceptions*, at p. 52. It was developed by Seavey: 29 Yale L.J. pp. 859–95. It is one of the bases of the American *Restatement of the Law of Agency*: (§ 12 states that an essential characteristic of the relationship of agency is that " an agent or apparent agent holds a power to alter the legal relations between the principal and third person and between the principal and himself.") Falconbridge, in 17 Can.Bar Rev. 248, discusses the whole law of agency in terms of the agent's power. But only a few English text-writers have appreciated this theory. Salmond expressed it in his draft of the *Law of Contracts*: see *Salmond & Winfield*, pp. 338–40: (" An agent is a person who is authorised by law to exercise on behalf of another person, called his principal, any power possessed by that other person . . . of doing any act in law.") Montrose accepted it in *The Basis of the Power of an Agent in Cases of Actual and Apparent Authority*, 16 Can.Bar Rev. 757. Powell has now adopted it in his *Law of Agency* (1952). But neither Hanbury in his *Principles of Agency* (1952), nor Bowstead nor his editors, nor the editors of the third edition of Halsbury's *Laws of England* have referred to this theory. The English judges have occasionally described an agent as holding such a power: *e.g.*, Bowen L.J. in *Read* v. *Anderson* (1884) 13 Q.B.D. 779, at p. 782; Wright J. in *Lamb* v. *Goring Brick Co.* [1932] 1 K.B. 710, at p. 713; Lord Esher in *Salford Corporation* v. *Lever* [1891] 1 Q.B. 168, at pp. 174–5; Mellish L.J. in *Parker* v. *McKenna* (1874) L.R. 10 Ch. 96, at p. 125; Romilly M.R. in *Pariente* v. *Lubbock* (1855) 20 Beav. 588, at pp. 597–8; Lord Watson in *Stumore* v. *Breen* (1886) 12 App.Cas. 698, at pp. 704–5.

This power-liability relation, which, it is contended, is the nucleus of the relation of principal and agent, needs to be examined more closely. A power-liability relation is one of the fundamental legal relations.[64] It exists between two persons, A and B, when A has the ability, conferred on him by law, by his own acts to alter B's legal relations. Agency is but one of the numerous kinds of power-liability relations recognised in our legal system. The distinctive feature of the agency power-liability relation is that the power of the one party to alter the legal relations of the other party is a reproduction of the power possessed by the latter to alter his own legal position. In other words, the power conferred by law on the agent is a facsimile of the principal's own power. This is to be inferred from the main principles of the law of agency, notably the following : when an agent acts on behalf of his principal in a legal transaction and uses the principal's name, the result in law is that the principal's legal position is altered but the agent himself drops out of the transaction : persons who are not themselves *sui juris* may nevertheless have the power to act as agents for persons who are : the power of an agent to bind his principal is limited to the power of the principal to bind himself : if the powers of the principal to alter his own legal relations are ended by his death, insanity, or bankruptcy, the agent's powers are terminated automatically. This manifest similarity between the principal's capacity to perform acts in law and his agent's capacity to perform them for him was formerly rationalised, as Holmes has explained,[65] by the fiction that principal and agent were one person in law. Pollock's analysis was more penetrating : " by agency the individual's legal personality is multiplied in space." [66] Seavey went to the heart of the relationship of principal and agent when he wrote : " it [agency] is . . . the result of a grant of power by the principal." [67] Salmond expressed the same idea when he described agency as " a grant of authority," [68] though the use of the term " authority " is unfortunate.[69]

At this juncture it is tempting to define the relation of principal and agent as that existing between two legal persons, P and A, when A is invested with a legal power to alter P's legal relations

[64] Salmond, *Jurisprudence*, 10th ed., pp. 241–4: Hohfeld, *Fundamental Legal Conceptions*, pp. 50–60.

[65] *Agency*, 4 Harv.L.R. 345, 5 *ibid.* 1.

[66] *Pollock on Contract*, 13th ed., p. 45.

[67] 29 Yale L.J. 859, at p. 863.

[68] Salmond and Winfield, *Law of Contracts*, p. 340.

[69] The term " power " is not a synonym for " authority." A power is a legal concept: it connotes the ability of a person to alter legal relations by doing some act: an agent's power is such an ability existing in the eyes of the law. Authority is a matter of fact: it connotes that one person has given instructions or permission to another to act on his behalf. The legal attribute of an agent, his power, may be called into being by the fact that he has his principal's authority to act, but it may be called into being by other facts, such as the necessity of the case.

which is a facsimile of the legal power possessed by P himself, and further to proceed to distinguish the relation from such other special legal relations as master-servant and trustee-beneficiary on the simple ground that in the latter relations this power-liability nexus is not essential. But in common law special legal relations are not to be confined within the strait-jackets of definitions; *elegantia juris* may be achieved only at the expense of the dynamic element in our law. Moreover the distinctions between agency and these other special legal relations cannot be so sharply drawn. Suffice it to assert that in mid-twentieth-century English law the nucleus of the rules in the doctrine of principal and agent is this power-liability relation.

Finally, it remains to restate the normal incidents of agency in terms which establish their connection with this essential power-liability relation.

1. An agent is bound to use reasonable care in the exercise of his power.[70] This is a comprehensive obligation which includes duties to use diligence, to employ skill, to act according to the usage of particular trades,[71] and to give the principal correct information.[72]
2. An agent is bound to obey the lawful instructions given to him by his principal concerning the exercise of his power as agent.[73]
3. An agent is under a duty to make no profit out of any transaction connected with his power as an agent, without the approval of his principal.[74]
4. An agent is bound to make a full disclosure of any personal interest he may have in any transaction which he has the power to effect as agent.[75] Accordingly an agent is disabled from contracting on his own account with his principal, so long as he retains the character of agent.[76]
5. An agent is under a duty to hand over to his principal on demand any property, whether money, goods or land, which he has received in his capacity as agent.[77] The agent is disabled from disputing his principal's title to such property,

[70] *Lee* v. *Walker* (1872) L.R. 7 C.P. 121; *Stumore* v. *Breen* (1886) 12 App.Cas. 698.
[71] *Solomon* v. *Barker* (1862) 2 F. & F. 726.
[72] *Cassaboglu* v. *Gibb* (1882) 11 Q.B.D. 797.
[73] *Fray* v. *Voules* (1859) 1 E. & E. 839; *Smart* v. *Sandars* (*No.* 1) (1846) 3 C.B. 380; *Jarvis* v. *Moy* [1936] 1 K.B. 399. In all these cases there was a contract between the parties and the courts treated this duty as contractual. In the latter case the Court of Appeal decided that the duty of a stockbroker to obey his client's instructions concerning the purchase of shares was a contractual duty for the purposes of the County Courts Act, 1919, s. 11. Nevertheless it is submitted that the duty attaches even to agents who act gratuitously. *Cf. Restatement of Agency*, §§ 14, 378d, 385b.
[74] *Parker* v. *McKenna* (1874) L.R. 10 Ch. 96.
[75] *Rothschild* v. *Brookman* (1831) 2 Dow. & Cl. 188.
[76] *Bentley* v. *Craven* (1853) 18 Beav. 75.
[77] *Harsant* v. *Blaine, McDonald & Co.* (1887) 56 L.J.Q.B. 511.

either by setting up his own title [78] or that of a third person.[79]

6. An agent who has the power to purchase property for his principal and in fact purchases the property in his own name, becomes the trustee of that property for the benefit of his principal.[80]
7. An agent who receives money or goods from or for his principal in the course of his agency is bound to keep that property separate from his own and that of others,[81] unless there is a trade custom to the contrary.
8. An agent who has the power to effect several or complex transactions for his principal is under a duty to render accurate accounts to his principal on demand.[82]
9. An agent is bound to act in the best interests of his principal.[83]
10. An agent owes a duty to his principal, both during and after the period of agency, not to make use of materials or confidential information acquired in the course of his agency in a manner detrimental to his principal's interests.[84]
11. An agent is under a duty to disclose to his principal any information he possesses which is likely to influence the principal's judgment in agency transactions [85] or transactions *inter se*.[86]
12. When an agent has promised to exercise his power, and the principal has relied on the promise, and the agent fails to do so, he is bound to inform the principal of the fact within a reasonable time.[87]
13. An agent is disabled from delegating his powers to a sub-agent unless his powers extend to the appointment of a sub-agent.[88]
14. A principal (as well as an agent) has the power to terminate the relation of agency at will.[89]
15. An agent has a right to an indemnity from his principal against losses and liabilities which he may suffer in the course of his agency.[90]

[78] *Dixon* v. *Hamond* (1819) 2 B. & Ald. 310.
[79] *Blaustein* v. *Malz* [1937] 2 K.B. 142. Exceptionally an agent who is a bailee of goods from his principal can plead *jus tertii*: *Biddle* v. *Bond* (1865) 6 B. & S. 225.
[80] *Lees* v. *Nuttall* (1829) 1 Russ. & M. 53; (1834) 2 Myl. & K. 819.
[81] *Burdick* v. *Garrick* (1870) L.R. 5 Ch. 233.
[82] *Pearse* v. *Green* (1819) 1 Jac. & W. 135.
[83] *Harrods, Ltd.* v. *Lemon* [1931] 2 K.B. 157.
[84] *Lamb* v. *Evans* [1893] 1 Ch. 218; *Nordisk Insulinlaboratorium* v. *Gorgate Products, Ltd.* (*C. L. Bencard, 1934, Ltd.*) [1952] 2 All E.R. 1040; [1953] 2 W.L.R. 879.
[85] *Keppel* v. *Wheeler* [1927] 1 K.B. 577.
[86] *Demerara Bauxite Co.* v. *Hubbard* [1923] A.C. 673.
[87] *Callander* v. *Oelrichs* (1838) 6 Scott 761.
[88] *De Bussche* v. *Alt* (1877) 8 Ch.D. 286.
[89] *Smart* v. *Sanders* (No. 2) (1848) 5 C.B. 895, at p. 916, *per* Wilde C.J.
[90] *Adamson* v. *Jarvis* (1827) 4 Bing. 66.

16. An agent has a right to retain possession of goods and chattels belonging to his principal until his right to an indemnity (or to remuneration) is satisfied.[91]

The principles underlying these rules are that an agent is not to be permitted to misuse the power with which he is invested, and that he is entitled to reimbursement for necessary expenses.

Prima facie these rules apply to principals and agents whenever the relation of agency is created. But in particular cases some of them may be excluded by abnormal circumstances, such as the fact that the agent is an infant, or that the relation is not fiduciary, or that it has only been created by ratification or under necessity, or that it is for the purpose of doing an unlawful act. Further, these incidents may be excluded from a particular relation by the agreement of the parties to the contrary. Besides, when it happens that a contract accompanies an agency the parties may exclude, vary, adopt, or add to these normal incidents of the relation.

F. E. Dowrick.*

[91] *Kruger (Cruger)* v. *Wilcox (Wilcocks)* (1754) 1 Keny. 32; Amb. 252.

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BANK PASS BOOKS AND STATEMENTS

I

The late Dr. Hart in his *Law of Banking* [1] wrote:

> "It is . . . clear that the receipt by the customer of the pass book containing an entry of the balance together with the cashed cheques debited therein, and the return of the former to the banker without objection being raised to any of the entries, does not amount to a settlement of account in respect of those entries; and that the mere omission on the part of the customer to examine the entries and cheques with business-like promptitude and care does not constitute negligence."

Two distinct propositions are involved here: (*a*) the receipt and return of the pass book do not constitute a settled account between banker and customer, and (*b*) the customer is under no legal duty to examine his pass book.

There are comparatively few reported cases which support these propositions, and it is open to the House of Lords to review them. The oldest case which may be said to support them is no earlier than 1890 and that was strongly criticised by contemporary writers.[2] The courts in the United States have laid down rules governing this aspect of the relationship between banker and customer which are more favourable to bankers than those enunciated by Hart.[3]

From time to time bankers in this country are faced with heavy losses when customers discover—sometimes after some years have elapsed—that their accounts have been debited with forged cheques. As a general rule, a bank has no defence in this type of case to an action by a customer claiming a declaration that his account has been wrongfully debited [4]: in fact such claims are usually settled in full by the bank concerned. It is not surprising that the banks regard this as unjust—particularly in cases where the customer has

[1] 4th ed., 1931, p. 262. See also Lord Chorley, *Law of Banking*, 3rd ed., 1950, p. 172.

[2] See *post*, pp. 42–43, 55, note 55.

[3] See Part IV of this article.

[4] *Aliter* if the bank can show that the customer knew of the forgeries and kept silent, with the result that the bank's position has been prejudiced: see *Greenwood* v. *Martins Bank, Ltd.* [1932] 1 K.B. 371, C.A.; affirmed [1933] A.C. 51. Furthermore, the effect of McNair J.'s decision in *Brewer* v. *Westminster Bank, Ltd.* [1952] 2 All E.R. 650 seems to be that where one of two parties to a joint account forges the other's signature on cheques drawn upon the account (the mandate expressly providing that the bank shall honour only drawings signed by both parties), the other party cannot succeed in obtaining a declaration against the bank. The decision was doubted by Dr. Goodhart in 68 L.Q.R. (1952) 446, and by Professor Glanville Williams in 16 M.L.R. (1953) 232. An appeal was settled in court on terms very favourable to the innocent joint account holder: see *The Times*, February 5, 1953, and a second note by Dr. Goodhart in 69 L.Q.R. (1953) 157.

received his pass book on many occasions and could have detected the forgeries at an early stage, if he had only taken the trouble to examine his pass book. As a rule the forgeries are skilfully executed: the usual method is to trace them from genuine signatures. This means that they cannot possibly be detected in the ordinary course of banking business. The aid of a microscope or photographic enlargements of the signatures are normally essential in order to determine whether the signatures are genuine or forged.

Bankers have not unnaturally asked themselves whether the House of Lords would be likely to adopt the views of Hart quoted above, or whether the House could be persuaded to lay down rules similar to those enunciated by the Supreme Court of the United States. The purpose of this article is to explore these questions.

II

The leading case in support of Hart's statement of the law is *Chatterton* v. *London and County Bank*.[5] A customer had had his pass book and paid cheques from his bank week by week, usually fetching them himself. He went through the pass book, ticking the debit items (which were called out to him from his ledger by a confidential clerk), and returned the book to the bank. After about eleven months he discovered that twenty-five of these cheques were not drawn by him, his signature having been forged by his clerk, and he claimed to have the sums in question credited to his account. At the first trial, the jury came to the conclusion that the cheques were not forged. However, the plaintiff persuaded the Divisional Court to order a new trial, mainly on the ground that the first trial was unsatisfactory. The bank appealed against this decision to the Court of Appeal.

The court was composed of Lord Esher M.R. and Lindley and Lopes L.JJ. The proceedings were brief. There were no lengthy arguments as to the law. No formal judgment was delivered, the bank's appeal being simply dismissed. But Lord Esher let fall some remarks which have had considerable influence upon this aspect of the relationship between banker and customer. Lopes L.J. was more cautious in his approach to the problem. The following is a verbatim extract:

Lord Esher. Suppose [the customer] never looked at the pass book?

Lopes L.J. What is the object of the book?

[5] The first trial is reported in *The Miller* newspaper for May 5, 1890; the proceedings in the Divisional Court in the same newspaper for July 7, 1890, and in *The Times* for June 27, 1890; the proceedings in the Court of Appeal, in *The Miller* for November 3, 1890; and the second trial in *The Miller* for February 2, 1891, and in *The Times* for January 21, 1891. See also Sir John Paget's Gilbart Lectures for 1903 published in the *Journal of the Institute of Bankers*, Vol. XXIV; the same author's *Law of Banking*, 5th ed., (1947), pp. 349–51; and Lord Chorley and P. E. Smart, *Leading Cases in the Law of Banking* (1953), p. 141.

Counsel. That he may examine it and see the state of his account.

Lord Esher. That may be. But supposing he does not do what he has a right not to do, how can that be relied on?

Counsel. The plaintiff might have been entitled to say "I decline to give you any assistance; if it is my signature, pay; if not, you will not be authorised in paying." But if he does not take up a merely negative position; if he says to the bank, either by language or conduct, "That is my signature. . . ."

Lord Esher (interrupting). Is everybody at liberty to send for his bank book week by week?

Counsel. Yes, and in the ordinary course of business, he does this in order to see that it is right.

Lord Esher. I do not know that he does.

Counsel. In any event, the point is a matter for the jury.

Lord Esher. But you must not put a burden on people the law never placed on them; you are putting on them the burden of saying, "Look through the pass book."

Lopes L.J. I cannot help thinking the pass book is sent for the purpose of examining it.

Lord Esher. But he is not bound to look at it.

The new trial took place before Mathew J., who left the following questions to the jury: (i) Were the cheques forged? (ii) If so, did the plaintiff so act as to lead the bank to believe they might honour the cheques now admitted to be forgeries, and did the bank do so because of his acts? (iii) What were the plaintiff's acts which misled the bank? In his summing up, the judge had already told the jury that the bank had not proved that they had been misled,[6] and so it is not surprising that the jury, with these specific questions before them, found for the plaintiff.

Lord Esher's observations were approved by Bray J. in *Kepitigalla Rubber Estates, Ltd.* v. *National Bank of India, Ltd.*[7] A fraudulent company secretary forged cheques drawn on the company's account. These forgeries were discovered within two months, and although the pass book had been written up several times during this period, the directors had not actually examined it during that time. Furthermore, there was evidence that each half-year the bank sent a form to their customer to sign acknowledging the correctness of the half-yearly balance. This tended to show that the parties in this particular case did not look upon the mere return

[6] *The Times*, January 21, 1891.

[7] [1909] 2 K.B. 1010. See also *Lewes Sanitary Steam Laundry Co., Ltd.* v. *Barclay, Bevan & Co., Ltd.* (1906) 11 Com.Cas. 255 at pp. 268–9 from which it appears that the bank had alleged want of care in the examination of the pass book. Kennedy J. as reported, omitted to deal specifically with this argument.

of the pass book without objection as amounting to a settlement of account.

Leading counsel for the bank, Mr. (later Lord Justice) Scrutton developed three arguments. First, he said that it is the duty of a customer to his banker to take reasonable care in the carrying out of his business relating to the issue of mandates; and he maintained that there had been no proper supervision of the secretary. Bray J. said he knew of no authority for this proposition, and that even if there was such a duty, the company had discharged it.

Secondly, Mr. Scrutton argued that the taking out of the pass book from the bank and its return by the plaintiffs without objection amounted to a settlement of account between the plaintiffs and the defendants. Mr. Scrutton's third argument was that a customer is bound to examine the entries in his pass book when he receives it, and to report any errors in it, and if he fails to do so and the bank is thereby misled to its prejudice, he cannot afterwards dispute the correctness of the balance shown in the pass book. In this respect, he submitted that Lord Esher's observations to the contrary in *Chatterton's* case ought not to be followed. If the directors had examined the pass book, they would have discovered the forgeries. Thus, he argued that the plaintiffs were estopped from denying the correctness of the balance shown in the pass book. Mr. Scrutton does not seem to have pressed his second and third arguments seriously, no doubt because the very short period during which the frauds were committed and the special arrangements for acknowledging the correctness of the balance half-yearly were both difficult obstacles.

In giving judgment for the plaintiff, Bray J. said he knew of no authority in this country for the "settled account" proposition. Referring to Lord Esher's remarks in *Chatterton's* case as reported in *The Miller*, he said [8]: "That is not, of course, an authorised report, but one cannot read it without being impressed by the fact that it must have correctly stated Lord Esher's language. At all events the language used seems very good sense."

The *Kepitigalla* case was followed in *Walker and Another* v. *Manchester and Liverpool District Banking Co., Ltd.*[9] In the latter case the plaintiffs were trustees under a settlement. One of them, Mr. Walker, had a clerk who forged three cheques drawn on the plaintiffs' account. These were paid by the defendant bank and debited to the account in March, 1910, August, 1911, and August, 1912, respectively. Mr. Walker had been away from his office when the cheques were drawn, and he did not see the pass book between March, 1910, and December, 1912. Counsel for the bank admitted that there was a body of authority which he frankly confessed he had great difficulty in distinguishing; but he said

[8] [1909] 2 K.B. at p. 1027.
[9] (1913) 29 T.L.R. 492.

that, in view of the possibility of the case going further, he desired to make certain submissions. He then argued that the pass book constituted a stated account between the parties and that a customer is under a duty to examine his pass book. Channell J. gave judgment for the plaintiffs, saying that, in his opinion, the case was to all intents and purposes identical with the *Kepitigalla* case. There is no report of any appeal from his decision.

Finally, in the recent case of *Brewer* v. *Westminster Bank, Ltd.*,[10] similar arguments were advanced on behalf of the bank in regard to the bank statements delivered from time to time. But these arguments were not pressed, because it became clear from the evidence that the statements had never been sent to the plaintiff: they had been forwarded to the other party to the joint account, who had in fact committed the forgeries. As regards the plea based on an account stated, McNair J. said he would adopt the observations of Bray J. on that point in the *Kepitigalla* case and added: "... for the purpose of the present case it is, I think, sufficient to say that there was no evidence of any acceptance by the plaintiff of any bank statement since she never received it. ..." [11]

This concludes the review of the cases which support Dr. Hart's propositions cited at the beginning of this article. Attention will now be directed to decisions prior to *Chatterton's* case.

III

The starting-point is *Devaynes* v. *Noble* [12] decided early in the nineteenth century. That case was concerned with the claims of several classes of creditors of a banking partnership, which had become bankrupt, against the estate of a deceased partner. Certain points were referred to the master, and he prepared a report setting out, amongst other matters, the custom of bankers [13]:

> "A book, called a passage-book, is opened by the bankers and delivered by them to the customer. [The master then stated the nature of the entries therein.] For the purpose of having the passage-book made up by the bankers from their own books of account, the customer returns it to them from time to time, as he thinks fit; and, the proper entries being made by them up to the day on which it is left for that purpose, they deliver it again to the customer, who, thereupon, examines it, and, if there appears any error or omission, brings or sends it back to be rectified, or, if not, his silence is regarded as an admission that the entries are correct. ... The course of business is the same between such bankers and their customers resident at a distance from the metropolis except that, to avoid the inconvenience of sending in and returning the

[10] [1952] 2 All E.R. 650.
[11] [1952] 2 All E.R. at p. 656.
[12] (1816) 1 Mer. 529.
[13] 1 Mer. at pp. 535–7.

passage-book, accounts are, from time to time, made out by the bankers, and transmitted to the customer in the country, when required by him, containing the same entries as are made in the passage-books . . . on the receipt of which accounts, the customer, if there appears to be any error or omission, points out the same by letter to the bankers; but, if not, his silence, after the receipt of the account, is in like manner regarded as an admission of the truth of the account. . . ."

It seems clear that this aspect of the master's report was accepted as correct by the court. In that part of *Devaynes* v. *Noble* generally known as *Clayton's* case (dealing with the appropriation of payments in an unbroken current account), Sir William Grant M.R. said in his judgment: " . . . the report states that the silence of the customer after the receipt of his banking account is regarded as an admission of its being correct. Both debtor and creditor must, therefore, be considered as having concurred in the appropriation." [14]

In addition to *Devaynes* v. *Noble*, there are several other cases which support the view that a pass book passing to and fro constitutes, or is evidence of, a stated and settled account between banker and customer. Thus in *Ex p. Randleson* [15] Sir J. Cross said: " With regard to the pass book, it may be observed that bankers make up these books every year, in order to satisfy their customers of the state of their accounts with them. The only inference, therefore, that can be drawn of any entry in the pass book is that the customer, by keeping the book, admits the statement in it to be correct." Again in *Blackburn Building Society* v. *Cunliffe Brooks & Co.*[16] Lord Selborne referred to " the doctrine that a pass book passing to and fro is evidence of a stated and settled account."

The " settled account " argument was one of the defences pleaded in *Vagliano Brothers* v. *Bank of England.*[17] The plaintiffs claimed a declaration that the defendants, their bankers, were not entitled to debit them with the amount of certain forged bills of exchange accepted by them and made payable at their bankers. Forty-three bills were involved, and the forgeries continued over a period of six months. The case was tried before Charles J., and three grounds of defence were relied upon by the bank. First, it was said that the bank was protected by section 7 (3), Bills of Exchange Act, 1882, which provides that " where the payee is a fictitious or non-existing person, the bill may be treated as payable to bearer." If the bills could have been so treated, it was not

[14] 1 Mer. at p. 610.
[15] (1833) 2 Deac. & Ch. 534 at p. 541.
[16] (1882) 22 Ch.D. 61 at pp. 71–2. See also *Williams* v. *Griffith* (1839) 5 M. & W. 300; *Commercial Bank of Scotland* v. *Rhind*, 1860, 3 Macq. 643 at p. 651 (H.L.Sc.); and *Woods* v. *Thiedemann* (1869) 1 H. & C. 478 at pp. 492–3.
[17] (1889) 22 Q.B.D. 103; affirmed by C.A. 23 Q.B.D. 243; reversed by H.L. [1891] A.C. 107.

disputed that the bank would have been justified in debiting its customer. This point was decided by Charles J. against the bank. Secondly, it was argued that there was such negligence on the part of the plaintiffs as to be in law the direct cause of the loss of the money. This, too, failed. Finally, it was argued that the pass book constituted an account stated between the plaintiffs and the defendants, which, it was urged, could not be opened. *Woods* v. *Thiedemann* [18] appears to have been the only authority cited in support of this argument, which Charles J. rejected in the following words: "... at the time the book was balanced the frauds of Glyka had not been discovered; and when the discovery was made I do not see any reason why the items debited should not be questioned." [19]

The bank's appeal was dismissed by the Court of Appeal. In the judgment of the majority,[20] it was held that the bank was not protected by section 7 (3) of the 1882 Act and that the plaintiff had not been guilty of negligence immediately connected with the transactions so as to disentitle him to recover. Dealing with the argument relating to the pass book, the court said [21]:

> "The plaintiff from time to time received from the bank his pass book, with entries debiting the payments made, for which the bank sent the bills as vouchers, which were retained by the plaintiff when he returned without objection the pass books. It was contended that this was a settlement of account between him and the bank, and that he had been guilty of such negligence with respect to the examination of the vouchers as would have prevented him from being relieved from this settlement of account. But there was no evidence to show what, as between a customer and his banker, is the implied contract as to the settlement of account by such a dealing with the pass book, or that, having regard to the ordinary course of dealing between a banker and his customers, the plaintiff had done anything which can be considered a neglect of his duty to the bank or negligence on his part."

This was the first occasion upon which any court had suggested that evidence as to the implied contract between a customer and his banker as regards the pass book should be adduced. *Devaynes* v. *Noble* (which was not cited before the trial judge, or the Court of Appeal, or the House of Lords) would surely have been relevant on this point, for in that case the custom had been proved to the satisfaction of the court: the banker enters up the pass book and hands it to the customer who examines it, "and, if there appears any error or omission, brings or sends it back to be rectified, or, if not, his silence is regarded as an admission that the entries are

[18] (1869) 1 H. & C. 478.
[19] 22 Q.B.D. at p. 127.
[20] Cotton, Lindley, Bowen, Fry and Lopes L.JJ. Lord Esher M.R. dissented on the ground that, in his opinion, s. 7 (3), Bills of Exchange Act, 1882, applied.
[21] 23 Q.B.D. at p. 263.

correct. . . ." [22] And it is a firmly established principle of English law that once a particular custom has been judicially recognised, it becomes incorporated in the common law and no evidence of any different usage will be admitted by the courts in the future.[23]

In *Vagliano's* case the bank appealed to the House of Lords, this time successfully.[24] But the appeal succeeded on grounds unconnected with the pass book. Of the eight judges who heard the appeal, only Lord Halsbury L.C. referred expressly to this aspect of this case. In the course of his speech, he asked rhetorically: " Was not the customer bound to know the contents of his own pass book? " [25]

IV

Leather Manufacturers' National Bank v. *Morgan* [26] is the leading case in the United States on the legal effect of pass books. A confidential clerk was entrusted with the task of filling up his employer's cheques and counterfoils. He got various cheques signed by his employer and adroitly raised the amounts of some of them. These he cashed, and handing the original amount of the cheques to his employer, appropriated the balance. The employer made a practice of examining his cheque book and counterfoils from time to time, but the clerk seems to have had the task of adding up the amounts of the counterfoils; and it appears that, to escape detection, the clerk so manipulated the additions as to make the balance agree with that shown in the pass book. The frauds continued over a period of six months, during which the book was made up and returned three times with the paid cheques. In each case the employer let the clerk receive and keep the book. The clerk destroyed the altered cheques and " balanced " the pass book. At last, the clerk being away for a day, his employer compared the book with the counterfoils, and the frauds were discovered. The

[22] 1 Mer. at p. 536.

[23] *Per* Lord Mansfield in *Edie* v. *East India Co.* (1761) 2 Burr. 1216 at p. 1222; *per* Cockburn C.J. in *Goodwin* v. *Robarts* (1875) L.R. 10 Ex. 337 at pp. 346 and 352; *per* Kennedy J. in *Bechuanaland Exploration Co.* v. *London Trading Bank, Ltd.* [1898] 2 Q.B. 658 at pp. 674–5. More recently the principle was reaffirmed by the Privy Council: *Bank of Baroda, Ltd.* v. *Punjab National Bank, Ltd.* [1944] A.C. 176 at p. 183. Professor (now Lord) Chorley criticised this rule in his Inaugural Lecture in the University of London. " A usage might alter several times with developing methods of business, and so long as the existing usage was not challenged and thereupon declared by the courts there would be no difficulty, but so soon as there is a decision the usage becomes stereotyped in law as it stands at that particular moment. . . . The merchants are up to a point privileged to be law makers, but unlike most others who have that power, when they have once made a law they can neither repeal it nor alter it ": 48 L.Q.R. (1932) at p. 63.

[24] [1891] A.C. 107.

[25] [1891] A.C. at p. 116. The decision in the bank's favour was given by Lord Halsbury L.C. and by Lords Watson, Herschell, Macnaghten and Morris on the ground that s. 7 (3), Bills of Exchange Act applied; and by Lord Halsbury L.C. and by Lords Selborne, Watson and Macnaghten for reasons turning on the conduct of the parties.

[26] (1885) 117 U.S. 96.

employer frankly admitted that, if he had checked the book on any of the previous occasions, he would have discovered that his account had been charged with incorrect items. In the court of first instance, the judge practically directed the jury to find against the bank on the ground that the customer was under no duty to the bank to examine his pass book and the cheques returned with it. The bank appealed to the Supreme Court of the United States.

The Supreme Court ordered a new trial. They declared that the view of the court below as to a customer's obligations did not seem to them "to be consistent with the relations of the parties or with principles of justice."[27] The sending of the pass book by the customer to be written up and returned with the vouchers was a demand on his part to know what the bank claimed to be the state of his account. The return of the book with the vouchers was the answer to that demand, and imported a request by the bank that the depositor would, in proper time, examine the account so rendered, and either sanction or repudiate it. The court then quoted the master's report in *Devaynes* v. *Noble*,[28] and said it was as applicable to the usages of the United States as it was to the usages of business in London at the time it was made. Dealing with the arguments concerning an account stated, the court continued[29]:

> "Without impugning the general rule that an account rendered which has become an account stated, is open to correction for mistake or fraud, other principles come into operation, where a party to a stated account, who is under a duty, from the usages of business or otherwise, to examine it within a reasonable time after having an opportunity to do so, and give timely notice of his objections thereto, neglects altogether to make such examination himself or to have it made in good faith, by another for him; by reason of which negligence the other party, relying upon the account as having been acquiesced in or approved, has failed to take steps for his protection which he could and would have taken had such notice been given. In other words, parties to a stated account may be estopped by their conduct from questioning its conclusiveness."

In English law it is established that a customer will be estopped from claiming a declaration that his account has been wrongfully debited with forged cheques, provided that he actually knew of the forgeries and kept silent, with the result that the bank's position has been prejudiced.[30] But the result of the English decisions from *Chatterton's* case onwards is that there is no positive duty on the customer's part to examine his pass book and paid cheques; and if

[27] 117 U.S. at p. 106.
[28] *Ante*, pp. 45, 46.
[29] 117 U.S. at pp. 107–8.
[30] *Greenwood* v. *Martins Bank, Ltd.* [1932] 1 K.B. 371, C.A., affirmed [1933] A.C. 51.

there is no duty, there can be no estoppel by negligence. The Supreme Court made clear its view as to this aspect of the relationship between banker and customer [31]:

> "In their relations with depositors, banks are held, as they ought to be, to rigid responsibility. But the principles governing those relations ought not to be so extended as to invite or encourage such negligence by depositors in the examination of their bank accounts, as is inconsistent with the relations of the parties or with those established rules and usages, sanctioned by business men of ordinary prudence and sagacity, which are or ought to be known to depositors.
>
> "We must not be understood as holding that the examination by the depositor, of his account, must be so close and thorough as to exclude the possibility of any error whatever being overlooked by him. Nor do we mean to hold that the depositor is wanting in proper care when he imposes upon some competent person the duty of making that examination and of giving timely notice, to the bank, of objections to the account. If the examination is made by such an agent or clerk in good faith and with ordinary diligence, and due notice given of any error in the account, the depositor discharges his duty to the bank. But when, as in this case, the agent commits the forgeries which misled the bank and injured the depositor and, therefore, has an interest in concealing the facts, the principal occupies no better position than he would have done had no one been designated by him to make the required examination; without, at least, showing that he exercised reasonable diligence in supervising the conduct of the agent while the latter was discharging the trust committed to him."

The Supreme Court therefore held that the question whether the plaintiffs were estopped by the negligence of their representative from disputing the correctness of the account as rendered by the bank from time to time was a mixed question of law and fact. It was not proper for the case to have been withdrawn from the jury, and a new trial was accordingly ordered.

There have been many reported decisions of the courts in the United States in which these principles have been applied. Considerations of space make it impossible to state the facts of these cases.[32] It must suffice to say that American judges have repeatedly held: (*a*) that an account rendered by a bank becomes an account stated when the depositor fails, without reasonable excuse, promptly to examine the statement and paid cheques and to report any forgeries; (*b*) that it is the customer's duty to examine his statement of account and paid cheques within a reasonable period after receiving them, and to report to the bank any forgeries or other discrepancies in the amounts which he may discover; and (*c*) that

[31] 117 U.S. at pp. 115–6.

[32] The American cases are collected in the *Corpus Juris* and the *Corpus Juris Secundum*. See also Paget's *Law of Banking*, 5th ed. (1947), pp. 353–9.

his failure to do so may amount to negligence and may estop him from disputing the correctness of the account.

Sir Frederick Pollock indicated his preference for the rules which have been developed in the United States. In a note on the *Kepitigalla* case, he explained that in the United States, if a customer fails to examine his pass book and to object to any items therein, he may be estopped from questioning the conclusiveness of the account. He added: "This seems good sense, and more businesslike than our English methods." [33]

V

Let us assume that a bank in this country decides to try to persuade our courts to follow the "good sense" of the American decisions. How should such a case be presented, and what are the prospects of success? In view of the decision of the Court of Appeal in *Chatterton's* case, it would almost certainly be necessary to take the matter as far as the House of Lords, though it is just possible that the Court of Appeal could be prevailed upon not to follow its own decision in *Chatterton's* case on the ground that the decision was given *per incuriam*, without the court's attention having been drawn to the earlier English authorities.

As stated at the beginning of this article there are two separate propositions involved. There is the argument concerning the alleged duty of the customer to examine his pass book, and there is the "account settled" argument.

(a) *The customer's duty to examine his pass book.* This duty can arise only as a result of a term, express or implied, in the contract between banker and customer. Some of the foreign banks with offices in London and some merchant banks send to their customers, for signature and return, forms of reconciliation; but the English joint-stock banks do not make it an express term of the contract that their customers shall examine their pass books or statements.

It is seldom easy to persuade a court to imply terms in a contract. Whether a particular term is to be implied must be decided by the test laid down in *The Moorcock* [34] and restated by Lord Wright in *Luxor (Eastbourne), Ltd.* v. *Cooper*,[35] where he cited with approval the following passage from Scrutton L.J.'s judgment in *Reigate* v. *Union Manufacturing Co. (Ramsbottom)* [36]:

> "The first thing is to see what the parties have expressed in the contract; and then an implied term is not to be added because the court thinks it would have been reasonable to have inserted it in the contract. A term can only be implied if it is necessary in the business sense to give efficacy to the contract;

[33] 26 L.Q.R. (1910) 4.
[34] (1889) 14 P.D. 64.
[35] [1941] A.C. 108 at p. 144: [1941] 1 All E.R. 33 at p. 57.
[36] [1918] 1 K.B. 592 at p. 605.

> that is, if it is such a term that it can confidently be said that if at the time the contract was being negotiated some one had said to the parties, 'What will happen in such a case,' they would both have replied, 'Of course, so and so will happen: we did not trouble to say that; it is too clear.' Unless the court comes to some such conclusion as that, it ought not to imply a term which the parties themselves have not expressed."

The relationship between banker and customer is that of debtor and creditor,[37] but as Bankes L.J. said in *Joachimson* v. *Swiss Bank Corporation*[38] there are quite a number of "implied superadded obligations." Thus one of the implied terms is that money lent to the banker on current account is not repayable except on demand.[39] Another implied term is that the bank shall not (subject to certain exceptions) disclose information concerning the customer's affairs without his consent.[40] These illustrations show that the courts have not declined to recognise implied terms in the contract between banker and customer where they consider such terms are necessary to give efficacy to the contract.[41]

To enable the court to recognise an implied term that the customer shall exercise reasonable care in the examination of his pass book and paid cheques, evidence should be adduced as to the purpose of the pass book. Sir John Paget indicated the correct method of approach in his Gilbart Lectures in 1903[42]:

> "It simply amounts to this, that you would have to say on oath that in ordinary cases banker and customer recognise that the object with which a customer receives his pass book and paid cheques is that he may check his account, and verify the items, particularly on the debit side, therein appearing, and that it is the understood thing that if there is any item he disputes, he should draw the bank's attention to it before or at the time he returns the pass book to the banker."

Paget's suggestion will require to be modified to take into account the fact that at the present day statements have largely replaced pass books.

Probably the most serious weakness of evidence of this nature is that it is inadequate, as the court might say: "It may well be true that *bankers* look upon pass books or statements as serving

[37] *Foley* v. *Hill* (1848) 2 H.L.Cas. 28.
[38] [1921] 3 K.B. 110 at p. 119.
[39] *Joachimson* v. *Swiss Bank Corporation*, *supra*.
[40] *Tournier* v. *National Provincial and Union Bank of England* [1924] 1 K.B. 461.
[41] In *Brewer* v. *Westminster Bank, Ltd.* [1952] 2 All E.R. at pp. 655–6, McNair J. declined to hold that where two customers open a joint account it is an implied term of this joint contract that each customer will act honestly in relation to the working of the account and, in particular, will not deceive the bank by fraud.
[42] Published in the *Journal of the Institute of Bankers*, Vol. XXIV (1903), p. 280. In *Vagliano's* case (*supra*) the Court of Appeal pointed out that no evidence as to the implied contract between a customer and his banker as regards the pass book had been adduced: see *ante*, p. 47.

this purpose, but before we would recognise an implied term to this effect, we would require evidence that *customers* also look upon them in the same way; for as Scrutton L.J. pointed out, in effect, an alleged implied term must be within the minds of both parties to the contract." In view of this possibility, it would be advisable to obtain evidence from a number of customers as to their practice in regard to statements sent to them by their bankers.

If satisfactory evidence of this nature were available, it would enable our courts to hold (as the courts in the United States have done long since) that there is an implied term in the contract imposing upon the customer the duty of examining his pass book or statement within a reasonable period. Disregard of this legal duty whereby loss resulted would amount to negligence on the part of the customer. Once this is established it would seem to follow that the customer must bear the loss. There are two ways of arriving at this result, both of which were explained by Lord Finlay L.C. in *London Joint Stock Bank* v. *Macmillan and Arthur*.[43] It will be remembered that in this case the drawers of a cheque had filled in the amount so carelessly that a fraudulent clerk was able to increase it. Lord Finlay said :

> " The duty which the customer owes to the bank is to draw the cheques with reasonable care to prevent forgery, and if, owing to neglect of this duty, forgery takes place, the customer is liable to the bank for the loss. . . . It may be put in various ways. Sometimes it has been said that an estoppel is created, and that as the negligence of the customer enabled the clerk to alter the amount to that which the banker paid, he is estopped from disputing the authority of the banker to pay. Sometimes it has been said that the payment must be allowed in account with the bank in order to avoid circuity of action, the customer being liable to the bank for his negligence. . . . In whichever of these ways it may be put, the ground is really one and the same—as the negligence of the customer caused the loss, he must bear it."

Although it is easy enough to see that the failure of the customer to draw his cheques with reasonable care to prevent forgery was the cause of the loss in *Macmillan's* case, it is perhaps not so clear that the failure of the customer to examine his pass book or statement is the cause of forged cheques being debited to the account. It might be argued that the forged instruments should be divided into two categories: the earlier ones in respect of which the customer's inactivity is in no sense a " cause," and the later ones which would never have been debited if the customer had exercised due care. If this argument succeeded, it would mean that the bank would be successful in resisting part only of the customer's claim.

[43] [1918] A.C. 777 at pp. 793–4.

(b) *The "settled account" argument.* The expression "account stated" has several meanings,[44] but the meaning of the term which is relevant here was explained by Lord Wright in delivering the judgment of the Privy Council in *Firm Bishun Chand* v. *Seth Girdhari Lal and Another*[45]:

> ". . . the essence of an account stated is not the character of the items on one side or the other, but the fact that there are cross items of account and that the parties mutually agree the several amounts of each and, by treating the items so agreed on the one side as discharging the items on the other side *pro tanto*, go on to agree that the balance only is payable. Such a transaction is in truth bilateral, and creates a new debt and a new cause of action. . . . The account stated is accordingly binding, save that it may be reopened on any ground—for instance fraud or mistake—which would justify setting aside any other agreement."

In this case the appellants carried on business as moneylenders in India, and the suit was brought on an account stated. Lord Wright observed that the closest parallel to the facts presented in the appeal was that of accounts between banker and customer. He continued[46]:

> "It has not been doubted that in law there can be a settled or stated account between banker and customer: what has been questioned is whether the acceptance by the customer without protest of a balance struck in the pass book constitutes a settled account, but the question has had reference merely to the issue whether such a settlement can be inferred as a matter of fact from the passing backward and forward of the pass book. The legal competence of such a settlement, if made, is not questioned."

Lord Wright then referred to Lord Selborne's remarks in *Blackburn Building Society* v. *Cunliffe Brooks & Co.*,[47] and to the judgment of the Court of Appeal in *Vagliano's* case,[48] and he concluded[49]: "It is clearly involved in these observations that there can in law be a settlement of account as between banker and customer, and that this is the law is constantly assumed and acted upon in practice."

Lord Wright did not refer to *Devaynes* v. *Noble*, where the master set out in his report the custom of bankers in relation to the pass book.[50] This case is clearly important to the "account stated" argument, because it supports the view that if the customer

[44] They were the subject of a detailed examination by Viscount Cave in *Camillo Tank Steamship Co., Ltd.* v. *Alexandria Engineering Works* (1921) 38 T.L.R. 134 at p. 143.
[45] (1934) 50 T.L.R. 465 at p. 468.
[46] (1934) 50 T.L.R. at pp. 468–9.
[47] See *ante*, p. 46.
[48] See *ante*, p. 47.
[49] (1934) 50 T.L.R. at p. 469.
[50] See *ante*, pp. 45, 46.

does not raise objection to the account within a reasonable time, it then becomes impossible for him subsequently to claim that it may be reopened. In this connection the Supreme Court of the United States recognised that an account stated is open to correction for mistake or fraud, but held that other principles apply where a customer neglects to examine, within a reasonable time, an account sent to him by his bank.[51]

In spite of the fact that the custom was judicially recognised in *Devaynes* v. *Noble*, it would be prudent to be in a position to prove it *de novo*. The evidence required is really the same as is needed to establish the implied term that the customer shall exercise reasonable care in the examination of his pass book or statement.[52]

The most serious practical difficulty of establishing the " account stated " argument is probably the increasing tendency to replace pass books with statements. Lord Chorley and Mr. P. E. Smart have pointed out that " the statement is not returned to the bank, and in the absence of such return it seems impossible to attempt to establish that degree of agreement which is essential to the account stated." [53] It may be that this goes too far, inasmuch as it seems to ignore the master's report in *Devaynes* v. *Noble*. It is clear from that report that statements and not pass books were used at that time for customers resident at a distance from the metropolis, and that on receipt of the account, " the customer, if there appears to be any error or omission, points out the same by letter to the bankers; but, if not, his silence, after the receipt of the account, is in like manner regarded as an admission of the truth of the account. . . ." [54]

Conclusion

The legal effect of pass books or statements forms an important aspect of the relationship between banker and customer. It seems to be the only important aspect of that relationship where the English courts and the courts of the United States have differed fundamentally. That there should be this divergence is surprising, because both legal systems are based upon the common law.

This divergence is not necessarily permanent. The House of Lords, upon a full review of the authorities, might well decide to dissociate itself from the views of Lord Esher in *Chatterton's* case. On the one hand, it is seldom that the final court of appeal will disturb a precedent which has been followed and acted upon for over sixty years. On the other hand, Lord Esher's remarks in *Chatterton's* case were severely criticised by Mr. Thomas Beven, an authority on the law of negligence, and by Sir John Paget, an authority on the law of banking.[55]

[51] See *ante*, p. 49.
[52] See *ante*, pp. 52, 53.
[53] *Leading Cases in the Law of Banking*, p. 143.
[54] See *ante*, p. 46.
[55] Beven wrote: " The case in the Court of Appeal seems to have been dealt with in the boisterous manner of Lord Esher's latter days. . . . In his

Perhaps the best estimate that one can make is that if a suitable case were taken to the House of Lords today, there would be even chances that the House would overrule *Chatterton's* case and lay down rules similar to those recognised by the Supreme Court of the United States. J. Milnes Holden.*

interlocutory remarks, which were many and apparently unpremeditated, Lord Esher was prone to be most inexact in his use of language. Notwithstanding, then, the aberration in *Chatterton* v. *London and County Bank*, no lawyer will have much difficulty in concluding that the English law as to entries in a pass book is identical with the American decisions; that there is a duty on the customer to inspect his pass book, and that entries in a pass book communicated to a customer are in the nature of an account stated, which may be impugned by the customer on the ground either of mistake or fraud, but which raise a prima facie case against the customer and put on him the onus of displacing them": *Negligence in Law*, 3rd ed. (1908), p. 1277.

Paget said that the decision in *Chatterton's* case was "all rather startling and shocking" and that Lord Esher had said "some things which come as a severe shock to my sincere admiration for him": *Journal of the Institute of Bankers*, Vol. XXIV (1903), pp. 281–2.

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CORRESPONDENCE

To the Editor of the *Modern Law Review*.

Sir,

Tactical Irritation of Tenants

16 M.L.R. 522

May I suggest that it is not necessary to grope among the niceties of eviction, trespass and nuisance in order to find a suitable cause of action for such a case as *Perera* v. *Vandiyar* [1953] 1 W.L.R. 672, C.A.; and that, while New Zealand and other Commonwealth countries' authorities may and should be adduced on occasions, on this particular occasion resort should have been had to history rather than to geography.

The cause of action which I have in mind is derogation from grant. In *Birmingham, etc., Banking Corporation* v. *Ross* (1888) 38 Ch.D. 295, C.A., Bowen L.J. described the maxim that a grantor shall not derogate from his grant as "really as old, I will not say as the hills, but as old as the Year Books, and a great deal older." In support of the proposition that the maxim applied to the facts before the court, reference could have been made to such decisions as *Grosvenor Hotel Co.* v. *Hamilton* [1894] 2 Q.B. 836, C.A., and *Aldin* v. *Latimer Clark, Muirhead & Co.* [1894] 2 Ch. 437. The conduct of the defendant landlords in those cases was egoistical and callous rather than cruel and wicked, most reprehensible, or malicious (such being the descriptions applied by Evershed M.R., Birkett L.J. and Romer L.J., respectively), but if an award of exemplary damages was to be made and upheld, clearly derogation from grant would have been a better basis than breach of contract.

It may possibly be arguable whether the maxim confers a benefit to which a statutory tenant becomes entitled; but the reports of *Perera* v. *Vandiyar* are more consistent with the plaintiff having been a contractual tenant at the time of the irritation, to which he appears to have reacted by barking up several wrong trees.

R. Borregaard.

REPORTS OF COMMITTEES

Report of the Royal Commission on Capital Punishment, 1949–1953, Cmd. 8932, September 1953

The Origin of the Commission and its Terms of Reference

This Commission was set up in 1949 as a result of the controversy over the abolition of capital punishment and the alternative of dividing murder into several degrees, only the most serious of which would carry the capital penalty. When the House of Lords rejected both these proposals, the Labour Government decided to appoint a Royal Commission, consisting of twelve members,[1] with Sir Ernest Gowers as chairman, charged with the duty of investigating "whether liability under the criminal law in Great Britain to suffer capital punishment for murder should be limited or modified, and if so, to what extent and by what means." They were also asked to inquire into the length and nature of the detention which should apply to persons who, but for their proposals, would have suffered capital punishment. At a later stage, and at the request of the Prime Minister, they agreed to consider whether any change should be made in the method of execution. In the discharge of these duties they were specifically requested to investigate the position in other countries insofar as it might throw light on these questions.

Interpretation of the Task

The Commission were debarred by their terms of reference from considering the question of the abolition of capital punishment, but in the course of their investigations they naturally accumulated a good deal of information which is just as relevant to this issue as to the question of limiting the scope of capital punishment, and they very wisely decided not to endeavour to separate this evidence or "to draw nice distinctions in this field." The result is that the report contains a great deal of material bearing on the major issue, which will prove extremely valuable when the matter is next debated in Parliament. One of the longest of the numerous appendices is devoted to a discussion of "The Deterrent Value of Capital Punishment."

It is evident from the report, which extends to over 500 pages (including the index), of which some 200 pages consist of statistical tables and diagrams and other useful appendices, that the Commission have spared no effort in the discharge of what they rightly

[1] Because of the resignation of Earl Peel in November, 1950, only eleven persons have signed the report.

describe as a complex and many-sided task. They have visited many prison institutions in England and Scotland, and have heard evidence from every possible source. (The minutes of evidence alone provide a rich mine of information about every conceivable aspect of the subject.) Not only have their inquiries in Great Britain been very thorough, but the Commission have visited the United States and five western European countries in order to collect evidence and inspect various prison institutions at first hand. In addition to all this, information has been collected from the Commonwealth countries and several other European countries. The result has been well worth the tremendous effort involved, and the Commission can rest content with a task well done. In their own words, they have taken the opportunity of placing on record "a comprehensive and dispassionate picture of the whole subject," and their report deserves to be closely studied by all those concerned to make up their minds about the various issues involved.

Proposals for Alleviating the Rigidity of the Present Law of Murder

The report begins by considering the various ways in which the liability to suffer capital punishment is at present modified, namely, by the action of the prosecution in limiting the charge, by the action of juries in refusing to convict of murder in certain cases, and by the exercise of the prerogative of mercy. The Commission hold that it is most undesirable to rely upon such means to overcome the excessive rigidity of our law of murder which they consider to be its outstanding defect. They have therefore sought ways in which the liability to be convicted for murder might be limited and brought more closely into line with popular sentiment with regard to the sort of people who should be executed. The result is that four specific proposals are made for altering the present law of murder:

(a) the abolition of the doctrine of constructive malice,
(b) the extension of provocation to cover mere words,
(c) the alteration of the law relating to suicide pacts, and the raising of the minimum age at which a person can be sentenced to death,
(d) the abolition of the M'Naghten Rules, or their extension to cover cases not at present included.

(a) *The abolition of the doctrine of constructive malice*

From the point of view of the criminal lawyer, one of the most interesting recommendations in the report is that the doctrine of constructive malice, which applies to death caused by an act done in the commission of a felony or in resisting arrest, should be abolished. This doctrine has been much criticised, especially by Mr. J. W. C. Turner, on the ground that it contravenes one of the basic requirements of criminal liability, the requirement of foresight of consequences. The Commission acknowledges the assistance they have

derived from Mr. Turner's examination of the doctrine. A brief discussion of the "resisting arrest" branch of the doctrine is followed by a long and detailed consideration of the felony-murder rule, as the other limb of the doctrine is described in the United States. In view of the almost equivalent importance of both limbs of the doctrine, and the fact that approximately equal space is given to each in the appendix dealing with the Development of the Doctrine of Constructive Malice, it is strange that so little is said in the body of the Report about the "resisting arrest" rule. But possibly this is because much of what is said about the felony-murder rule applies *mutatis mutandis* to the other rule.

The Commission note that the doctrine of constructive malice is not in practice applied except to deaths caused by deliberate acts of violence, and they wonder what purpose is served by a doctrine which appears merely to cover those deaths which in the absence of such a doctrine would still probably be held to be murder. They conclude that the doctrine is still used by the judges in order to exclude the possibility of a verdict of manslaughter in circumstances where otherwise that might be open to the jury, and that considerations of public policy are at the root of the doctrine. Such considerations alone, they say, can justify such a departure from a subjective test of criminal liability.

But one looks in vain in the report for any estimate of the significance of these considerations, despite the fact that several influential persons testified in favour of the retention of the doctrine on these grounds. Instead, the Commission appear to have been greatly impressed by the opinions of Lord Goddard and Mr. Justice Humphreys that the abolition of the doctrine would involve no serious danger that grave offenders would be inadequately punished, and the Commission have felt no difficulty in recommending its abolition. It is true that they mention that in the United States they encountered "virtual unanimity" of opinion in favour of the doctrine, and that the general view there was that "a man who embarks on violent crime and sets a chain of events in motion must take the consequences even if some of them are unforeseen or even unforeseeable." That this is not an entirely barbarous view appears to follow from the Commission's desire to retain it in relation to accomplices who agree to the use of force by the principal offender. The reason given for such retention is that it would place an almost impossible burden upon the prosecution if they had to prove that the degree of violence contemplated was such as to involve grievous bodily harm or an act likely to endanger life. It may well be thought that similar considerations apply with regard to the principal offender. Are the Commission trying to have it both ways?

(b) The extension of provocation to cover mere words

The law relating to provocation has long been regarded as unsatisfactory both in regard to the "reasonable man" test and

in regard to the situations which are legally recognised as provocation situations. The Commission have felt unable to recommend any change in regard to the applicability of the objective criterion of the reasonable man. They appear to fear that if the rule were changed, a bad-tempered man would have an unfair advantage over a good-tempered man, and would be able to secure an acquittal of murder in circumstances where the good-tempered man would be convicted. They express the belief that juries " not infrequently give weight to factors personal to the prisoner in considering pleas of provocation," and point out that in any case there is always the prerogative of mercy " to prevent any eventual miscarriage of justice." This represents a striking, and, it is submitted, a regrettable departure from the high principles stated at the outset of the Report, but perhaps it is too soon for the reasonable man to disappear entirely from the criminal law. After all, he has only recently been ejected from the law relating to the defence of mistake, and it is likely that he will linger longer in relation to crimes of negligence such as manslaughter.

The Commission feel much bolder when they come to the question whether the types of provocation recognised by law should be extended. They consider that mere words alone should be capable of amounting to provocation in the eyes of the law. They are not satisfied with Viscount Simon's statement in *Holmes* v. *D. P. P.* [1946] A.C. 588 at p. 600, to the effect that words might amount to provocation if the circumstances were of a most extreme and exceptional character. They consider this to be too narrowly expressed, and that there should be no distinction between provocation by words and other forms of provocation. It is suggested that this proposal goes too far in removing the matter out of the hands of the judge and leaving it to the jury to decide in every case whether the words amount to provocation. It might be better to provide that the judge should rule in every case whether the words are capable of amounting to provocation, and thus retain some measure of judicial control over the matter.

(c) *The alteration of the law relating to suicide pacts, and the raising of the minimum age at which a person can be sentenced to death*

In their endeavour to limit the scope of capital punishment, the Commission reviewed certain special categories of murder. As a result, they recommend that the law which now provides that the survivor of a suicide pact can be guilty of murder ought to be amended by the creation of a new offence of aiding and abetting or instigating the suicide of another person, punishable with imprisonment for life. There is much to be said for this proposal, although Mr. Justice Humphreys did not think it was necessary to make any change in view of the availability of an alternative charge of attempted suicide, which is widely used at the present day.

The Commission did not consider that anything should be done in the direction of recognising mercy killings, because in their view "it would be impossible to define a category which could not be seriously abused." The suggestion that the law should differentiate between the sexes and exempt women from capital punishment was given short shrift, although it was admitted that the idea of executing a woman was naturally repugnant.

The Commission were evenly divided on the question whether the age limit for capital punishment should be raised from eighteen to twenty-one. Six members of the Commission were in favour of raising the age, and five were against. The argument in favour derives support from the recommendation of the Select Committee on Capital Punishment in 1930, from the evidence of four prison medical officers, and of several distinguished medical specialists. The five members who opposed the proposal considered that the right course is to deal with each case on its own merits and not to exclude the death penalty altogether by a rigid and arbitrary rule related to a particular age. There is obviously much to be said for this view.

(*d*) *The abolition of the M'Naghten Rules, or their extension to cover cases not at present included*

The Commission interpreted their terms of reference sufficiently widely to enable them to carry out a comprehensive survey of the question of insanity and mental abnormality in relation to the crime of murder. The arguments for and against the M'Naghten Rules are marshalled with great clarity, both in the report itself and in an appendix, and the Commission come to the conclusion (with one dissentient, Mr. N. R. Fox-Andrews, Q.C., who adds a note to the report explaining his views) that the present law with regard to the defence of insanity should be changed. The majority of the Commission favour abrogating the rules altogether, and leaving it to the jury to determine in each case whether at the time of the act the accused was suffering from disease of the mind (or mental deficiency) to such a degree that he ought not to be held responsible. There is a weighty minority opinion which holds that it would be unwise to leave the issue of insanity to the jury without any guiding rules, and favours extending the present rules rather than abolishing them altogether. The extension proposed would cover disorders of the emotion rendering the accused incapable of preventing himself from committing the criminal act. The report is at pains to point out that this is not the old bogy, irresistible impulse, in a new guise, but it is possible that opponents of any change may find it hard to see the difference. The minority view is ably stated in a memorandum of dissent.

The Commission do not favour the introduction of any doctrine of diminished responsibility in English law, such as exists in

Scotland, but they do recommend that where mental deficiency has deprived a person wholly of responsibility for his conduct, it should excuse in exactly the same way as mental disease.

There are a number of minor recommendations which must be mentioned briefly. It is thought that independent medical specialists should be called in to assist the prison medical officers in deciding whether a man is fit to stand his trial, and in preparing the medical reports for the trial of every person charged with murder. It is also recommended that the trial judge should have power to raise the question of insanity of his own motion in any criminal trial. The suggestion that the court should appoint a panel of medical experts to report on the mental condition of a person charged with murder did not meet with approval, and there does not appear to have been any mention of the possibility of taking the decision as to sanity out of the hands of the jury entirely and entrusting it to the experts.[2]

Further Proposals for Increasing the Flexibility of the Law of Murder

Even assuming that the foregoing proposals were accepted, the Commission had to recognise that there would still be many cases where the present law held that the crime was murder when a lesser penalty would be more appropriate. They accordingly proceeded to investigate ways and means whereby a greater measure of flexibility might be introduced into the law of murder. Two main avenues were explored:

(i) the redefinition of murder or its division into degrees,
(ii) the establishment of a system of judicial or jury discretion.

(i) *The redefinition of murder or its division into degrees*

A redefinition of murder, along the lines of the Draft Criminal Code of 1879 or of Stephen's *Digest*, was found to have little to commend it, and the Commission accepted the evidence of witnesses who thought that "the flexibility of the common law, with its capacity for adaptation to changing circumstances, had great advantages over a rigid statutory formula." It is true that they politely remark that in their view "the extent to which the common law does in fact so adapt itself, especially in the field of criminal law, is sometimes overstated." But they accept the existing definition of murder as satisfactory, apart, that is, from the question of constructive malice.

The alternative was considered of the classification of murder into various degrees, only the most heinous of which would carry with it the capital penalty. It was a proposal along these lines which was rejected by the House of Lords prior to the appointment

[2] This suggestion has been made by Professor Glanville Williams in a recent lecture in the Current Legal Problems Series, on October 22, 1953.

of the Royal Commission. Despite the fact that the system of degrees of murder exists in many American states, and in several European countries, the Commission could discover no satisfactory basis upon which to found such a classification of murder, and regretfully concluded that "the object of our quest is chimerical and that it must be abandoned." After studying the discussion of the matter in the report, few will be prepared to challenge this conclusion.

(ii) *The establishment of a system of judicial or jury discretion*

The only remaining way whereby the flexibility of the law of murder might be increased appeared to the Commission to be by giving a discretion to the judge or the jury to decide whether the capital penalty should be imposed. Giving discretion to the judge was ruled out because, although it appears to have worked well in India, it was felt that this would be "too heavy a burden to place on any single individual." The judges who were consulted about it said it would be a very grave and unwelcome burden which Parliament ought not to ask them to assume.

This left the Commission with only one possibility, that of recommending a system of jury discretion. They have embraced this idea with about as much enthusiasm as a man embracing a hedgehog. They recognise that it would involve a fundamental change in the traditional functions of judge and jury in a criminal trial, in that hitherto juries have had no responsibility for fixing sentence. There would also be certain practical difficulties, which the Commission frankly admit.

What is proposed is that a trial for murder should be divided into two stages. The first part of the trial would be directed solely to the issue of guilt or innocence, and would conclude with the verdict of the jury on that issue. The second part of the trial would be directed to the question whether there were any extenuating circumstances. This would be a matter for the jury to decide, and they would have to be unanimous in their decision one way or the other. There would be placed before them such information as to the prisoner's history, character, mental condition and other mitigating circumstances as the defence chose to bring forward. The prosecution would not play an active role in the proceedings, but if the judge thought that the jury were in danger of being misled he would ask the prosecution to call any relevant evidence. It would be the duty of the judge to introduce the second stage of the trial by explaining to the jury what their duty was, and he would sum up to the jury before they considered their verdict. If they found there were extenuating circumstances, the judge would be bound to pronounce a lesser sentence than the death penalty.

This proposal is obviously fraught with difficulties, but we owe it to the Commission not to dismiss the idea out of hand. Under the present law, juries are frequently asked to decide between a

verdict of murder or manslaughter (in Scotland culpable homicide). And whenever insanity is raised as a defence they have the responsibility of deciding whether the accused should be sentenced to death or sent to Broadmoor. Although it may be said that at present their responsibility for the sentence is indirect, it is nevertheless a grave one, and the present proposal differs only in the frequency with which this grave responsibility would fall to the jury, and the directness with which it would be imposed. It is suggested that this system might be worth a trial. In Belgium, South Africa, and the majority of the States of the U.S.A., a system of jury discretion has been adopted, and appears to work satisfactorily. It has been suggested in some quarters that jury discretion would operate in practice in such a way as to eliminate or suspend capital punishment altogether, but the Commission do not take this view, and are quite confident that juries could be trusted to discharge their duty fairly.

Four practical questions occur to the present reviewer. In the first place, how could one limit the evidence of the defence in mitigation? The report admits that "it seems impossible to prescribe any limits to the evidence which the defence might call," but suggests that "reasonable limitations would probably grow up in the practice of the courts." Secondly, what would be the position if the jury disagreed at this second stage of the trial? Would there have to be a fresh trial, or would it be sufficient to empanel a fresh jury to try the issue of extenuating circumstances alone? If it is suggested that a fresh trial would be necessary in order for the jury to hear the whole of the evidence, would this be an infrequent occurrence, and if not, are we prepared to suffer the waste of time and expense involved? Thirdly, how could the development of a distasteful form of jury advocacy be avoided? Fourthly, how could any degree of uniformity of treatment be expected under such an arrangement? It is admitted in the report that errors on the side of leniency could not be corrected, but errors the other way could be dealt with by the exercise of the prerogative of mercy.

It is not surprising in view of all these difficulties that almost all the witnesses whose opinion was asked as to the merits of this proposal were strongly opposed to it. The Commission themselves admit that the disadvantages of such a system may be thought to outweigh its merits, and assert that if such a view were to prevail, then "the conclusion . . . would be inescapable that in our country a stage has been reached where little more can be done effectively to limit the liability to suffer the death penalty, and that the real issue is now whether capital punishment should be retained or abolished." It seems extremely unlikely that the question of abolition can be evaded in any discussion of capital punishment, but, Parliament having passed the buck to the Royal Commission,

it is clear that the Commission have now very neatly and most decisively passed it back.[3]

THE ALTERNATIVE TO CAPITAL PUNISHMENT

The Commission considered the conditions under which persons who, if their proposals were adopted, would not be executed, ought to be detained. They conclude that no change would be necessary either in the method of detention or its length. However they do discuss the desirability of establishing in this country a special institution to which persons who are mentally abnormal but are not in fact insane, such as psychopaths, could be sent. They strongly recommend that something be done along the lines of the institutions which exist for this purpose on the Continent.

METHODS OF EXECUTION

Extensive inquiries were made by the Commission into various alternative methods of execution, and the conclusion is reached that none was comparable with hanging for speed and efficiency.

J. E. HALL WILLIAMS.

[3] The Commission's recommendation of a system of jury discretion was discussed in the House of Lords on December 16, 1953: 185 H.L.Deb. 137–188. There was no division; but most of the speeches were in opposition to the recommendation.

NOTES OF CASES

The Two Negligent Servants

The doctrine of common employment was a bad doctrine and was rightly abolished. The doctrine of contributory negligence, as an absolute defence to an action, was also a bad doctrine and was rightly abolished. But the combined effect of the two abolitions is to raise a serious problem of justice which first fell to be considered in *Stapley* v. *Gypsum Mines, Ltd.* [1953] 3 W.L.R. 279. In its most abstract form the problem is this. Suppose that two servants in the course of their employment enter upon a dangerous and negligent undertaking, without the authority of and against the orders of the master, and one of them is injured. Had the injured servant stood alone in wrongdoing, he would have had no remedy against the master, for the master was not negligent towards him. Can the injured servant, since the two Law Reform Acts above referred to, claim to recover part of his damages from his fellow-servant, and in consequence from his master under the doctrine of vicarious responsibility?

Before stating the way in which this question arose, it may make matters clearer to mention a preliminary point. Generally a workman is under no duty to take positive action for the safety of his fellow-workmen. But there may be exceptions to this, and in particular by the Metalliferous Mines Regulations, reg. 15 (1), a workman must comply with safety directions given by his foreman, and it is implicit in the judgments in *Stapley's* case that a breach of this duty by a workman would make him liable in damages to an innocent fellow-workman who is injured by the breach; in consequence his employer would be vicariously liable to such fellow-workman. It seems also from the speech of Lord Tucker that the responsibility of the master can be reached by another route. Even if the wrongdoing servant is not himself under a duty of care to fellow-servants, his carelessness for their safety will be imputed to the master and will constitute a breach by the master of the master's duty of care. The question for decision was how far this liability of the master was affected where the injured workman was not innocent but participated in the negligence.

Two miners of equal status, the deceased Stapley and one Dale, were employed in the defendants' gypsum mine, neither being in charge of the other. At their working place they found that the roof was dangerous and told the foreman, who instructed them to fetch it down. After he had left them they tried unsuccessfully to

get the roof down and then jointly abandoned the effort and proceeded with their normal work. The roof fell and Stapley was killed. Stapley's widow sued his employers under the Fatal Accidents Act, basing her claim on common law negligence and on breach of statutory duty. Sellers J. found that there was no negligence on the part of the foreman, who was justified in leaving the men to carry out his orders; but the two men were each guilty of negligence causing the accident, and he accordingly awarded the widow damages against the employers reduced by 50 per cent.

The Court of Appeal unanimously reversed this judgment, holding the defendants not liable ([1952] 2 Q.B. 575). Singleton L.J. expressed the opinion that if Stapley had been injured and not killed, and if he had sued Dale for damages at common law, Dale would have had the defence that Stapley's agreement with him absolved him from any duty of care towards Stapley in regard to the roof. This appears to have been intended as a reference to the maxim *volenti non fit injuria*. If Dale was under no duty of care, his employers were under none either. Turning to the claim based on breach of statutory duty, Singleton L.J. apparently favoured the view that it failed by reason of the doctrine of *Smith* v. *Baveystock* ([1945] 1 All E.R. 531) that where the performance of a statutory duty is properly delegated by the employer to the workman himself, and the workman fails to perform it and is injured, the workman cannot take advantage of his own wrong. However, he went on to say that even if the employers were in technical breach of duty, their share of responsibility was not more than nominal. Apparently he did not propose to give effect to this view by an actual award of nominal damages, for he expressed the opinion that judgment should be entered for the defendants.

Birkett L.J. rested his judgment first on the doctrine of *Smith* v. *Baveystock*. He pointed out that under the ruling of Sellers J. if both men had been killed both their widows could have recovered half damages; yet under *Smith* v. *Baveystock*, if only one man is involved his widow can recover nothing. In the view of the learned Lord Justice, the fact that a duty is delegated to two men jointly cannot give each a right to half damages, when such a duty delegated to a single man would give him no right to damages. Birkett L.J. then proceeded to give a second ground for his decision, namely that the effective cause of Stapley's death was his own negligence in resuming work under the unsound roof when he had been ordered not to do so.

Morris L.J. considered the case under two heads: (1) the responsibility of the defendants for breach of their own statutory duty, and (2) their vicarious responsibility for breach of the statutory duty imposed on Dale. He held the defendants not liable under (1), apparently because of the doctrine of *Smith* v. *Baveystock*, though he did not refer to that decision by name. Under (2), the defendants were liable only if Dale was liable; but Dale was not liable because

his breach of duty was a breach of duty imposed upon him and Stapley jointly, and " there was no element of causation emanating from Dale that did not emanate from Stapley."

In the House of Lords, two lords (Porter and Asquith) would have upheld the judgment of the Court of Appeal on the ground of causation, Lord Asquith adding the opinion that the defendants were not in breach of duty under the statutory regulations on the construction of those regulations. However, three lords (Oaksey, Reid and Tucker) took the other view and had the last word; they held the employers liable, but only to the extent of 20 per cent. of the damages.

The one legal principle that emerges with any clarity from this variety of opinions is that, according to the view that prevailed, the negligence of Dale was not too remote a cause of Stapley's death. All three of the majority lords held this. If Dale had persisted in trying to fetch the roof down, as it was his statutory duty to do after the order from his foreman, or if on failing in the attempt he had gone for the foreman, the accident would not have happened. His negligence was therefore a cause of the accident; and it was moreover a legal cause.

This rejection of the " single cause " doctrine favoured by the other five appellate judges will give great satisfaction to those who fear the revival through the law of causation of the discredited last-opportunity doctrine. The validity of the decision on this point may best be shown by adding to the facts and supposing that damage had actually been suffered by someone who was not at fault. Suppose that another workman, X, who was not at fault and had no reason to suspect the weakness of the roof, had been injured in the same fall as that which killed Stapley. It is clear that X would have had a cause of action against both Dale and Stapley. Now the only difference between Stapley and X would have been that Stapley was himself guilty of negligence. But this fact should be expressed in terms of contributory negligence, not in terms of remoteness of damage. To regard the plaintiff's contributory negligence as making damage too remote would undesirably limit the power of apportionment given by the Contributory Negligence Act. Indeed, that Act will have no application unless the possibility of multiple legal causation is recognised. Lord Porter's attitude, that one must search not for *a* cause but for *the* cause, would leave it nothing whatever to do.

Apart from this consideration of policy the strong weight of recent authority shows that a mere *novus actus interveniens* does not break the chain of causation where the defendant should have foreseen what happened. It may seem surprising that five appellate judges should have reverted to the old narrow attitude to proximate cause, but perhaps the explanation is that a vague doctrine like that of legal causation is a convenient formula for purporting to

justify an opinion which in fact proceeds from an intuitive sense of justice applied to the case as a whole.

If it be accepted that the damage was not too remote, why did the House limit the damages to 20 per cent.? Lord Oaksey inclined to prefer the figure of 50 per cent. fixed by the trial judge. The dissenting Lords Porter and Asquith agreed that the figure should not be more than 20 per cent. because they really did not want to give the plaintiff anything. The effective decision to give only 20 per cent. was taken by Lords Reid and Tucker. Lord Reid expressed his reason by saying:

> "The claimant's share in the responsibility for the damage cannot, I think, be assessed without considering the relative importance of his acts in causing the damage apart from his blameworthiness. It may be that in this case Dale was not much less to blame than Stapley, but Stapley's conduct in entering the stope contributed more immediately to the accident than anything that Dale did or failed to do."

If "immediately" refers only to chronological order, it is difficult to see what relevance this consideration has to apportionment. To attempt to apportion damages by reference to degree of participation in the chain of causation is a hopeless enterprise, for it has no necessary connection with anything that would appeal to the ordinary person as being just and equitable. If a nurse is grossly negligent in putting poison into a food jar, her degree of blame, that is to say her legal responsibility, may far outweigh the later and more protracted negligence of a doctor in failing to discover that the plaintiff, who has eaten from the jar, has the symptoms of food poisoning and consequently failing to treat the plaintiff properly. Apportionment under the Act must, surely, be according to the degree of blame, not according to degree of causation, whatever that may mean. For this reason Lord Tucker's statement seems preferable, when he said:

> "Dale and Stapley were no doubt equally at fault up to that stage [when Stapley entered the dangerous stope], but then Stapley alone acted in contravention of reg. 7 (3) by entering and working in the stope which had not been made secure. He must, I think, consequently bear a much larger share of responsibility than the respondents."

This seems to mean that Stapley by incurring the danger was more at fault than Dale who went away. If Stapley really was more at fault, the weighting of the apportionment against him was just. But was he? Dale went away only because his duties happened to take him away; Stapley stayed under the defective roof because his work happened to be there. Lord Porter summed this up by saying: "Each, after discussing the matter with the other, went his own way and returned to his own work." Lord Oaksey said: "There was no suggestion that Dale went where he did because of the order or to report the matter or to make any

further effort to get the roof down." Dale thought nothing of going into the danger area, and in fact it was he who came upon the body of Stapley after the fall of the roof.

Let it be supposed that Dale had himself stayed to work under the defective roof and been killed as well as Stapley, and let it be further supposed that the estates of Stapley and Dale had brought cross-actions against each other (or against the employers as vicariously liable). It is a principle of the law of apportionment between tortfeasors that the apportionment of a particular head of damage should be on the basis of fault causing that very damage. The blame in respect of Stapley's death could not be affected by the fact that Dale died as well; therefore, on the decision of the House of Lords, Stapley's widow would still get only 20 per cent. of her damages from Dale's estate, Stapley being held 80 per cent. to blame. By parity of reasoning Dale's widow would get 20 per cent. of her damages from Stapley's estate, for the two men were in an identical position in relation to each other. But this is a demonstrably wrong result, for the logic of apportionment is such that if in the first action Stapley is held 80 per cent. to blame, he must also be held 80 per cent. to blame in the second action in which his estate is defendant, the circumstances in each case being the same. The object of the Contributory Negligence Act is to enable loss to be moved from where it falls to where it ought to fall; and here, although the negligence of the two parties is equal, the Act is made to work only as to 20 per cent. of the damage, the rest being allowed to lie where it happens to fall. Surely the only view consistent with the policy of the Act is that each should recover half from the other.

It is hard to resist the conclusion that the award of 20 per cent. against the employers was the result not of logic but of the milk of human kindness; it was the award of *something* by judges who were almost inclined to give nothing.

There may be some interest in reconsidering briefly the argument, favoured in the Court of Appeal, for giving nothing. The common sense of this argument starts from the position that if Stapley had been alone in his wrongdoing there could have been no recovery. Suppose that Stapley had been negligent in respect of the roof of his stope, and that Dale had been negligent in respect of the roof of an adjoining stope, and that Stapley and Dale had been killed in their respective stopes, again there could have been no recovery by either, for the negligence of neither would have contributed to the damage of the other. If, after the act of negligence by each, they had changed stopes, and each been killed in the other's stope, there would on the decision of the House of Lords have been an action for each estate against the other, and against the employers, for part damages. This is not a distinction that would appeal to the plain man; and even if logical for the liability of the workmen it seems to be of dubious justice to extend

the tort liability of the employer to circumstances of this kind. In any ordinary sense of the word, there was no tort by the employer.

To allow recovery at all leads logically to the conclusion that the recovery should be of 50 per cent. Suppose that there had been not two but ten servants involved in the default, and that Stapley alone had suffered damage: then it may seem to follow that he should, by parity of reasoning, have recovered 90 per cent. of his damages from the employers, who would be vicariously liable for the sum total of the one-tenth shares of each servant. If all ten men were injured, the employers would be liable to each for ninety per cent. of his damages. Such conclusions are repugnant to common sense, and it was perhaps an appreciation of their absurdity that led the five judges to take refuge in the doctrine of causation. There was in fact a better way out of the difficulty which appears to have received no attention. By disobeying the order of the foreman Stapley broke his contract of service and became liable in damages to his employers. These damages would include an indemnity in respect of damages that the employers might have to pay as a result of Stapley's breach of contract. The indemnity would therefore cover the damages adjudged payable to Stapley himself, and by the principle of avoiding circuity of action (that is to say, of not granting damages that would have immediately to be repaid) Stapley would be disabled from recovering such damages.

Strangely enough, this mode of denying recovery to a negligent servant has not been argued in any case arising out of an industrial accident. It could not, of course, be accepted without careful qualification. If the master has been guilty of personal negligence or breach of duty, or if some other servant has been guilty of a quite separate breach of duty, the court would not, it is conceived, deny the plaintiff servant recovery on the ground that he has committed a breach of contract, for that would be contrary to the spirit of the Contributory Negligence Act. But in circumstances like those of *Stapley's* case, where two servants commit an identical breach of contract at the same time by mutual consent, there would seem to be no reason of policy against a denial of recovery.

The general question might arise quite apart from the liability of a master. Suppose that A and B go together to search for a gas leak, each holding a naked light. Both lights ignite the gas at the same time, and A, B, and a third party, X, are injured. A and B are liable to X, the negligent act of each being a concurrent cause of the injury—none the less so because each was capable of causing it without the other. The common sense of justice would say that A and B must make equal contribution towards X's damages, and this result can be reached under the Tortfeasors

Act. Common sense would also say that A and B should not have cross actions in respect of any part of their own damages; but it is hard to perceive on what principle this disability can be rested. Not on contributory negligence, nor on causation. Assumption of risk might help, but it is rather a stretch to say that there is a genuine agreement between A and B waiving mutual rights of action. There would seem to be room here for the formulation of a new defence to exclude the operation of the Contributory Negligence Act. But perhaps *Stapley's* case bars such a development.

Glanville Williams.

Conspiracy and Public Mischief

Few cases in criminal law have evoked such criticism as *R.* v. *Manley*,[1] in which the accused was convicted for effecting a public mischief by falsely informing the police that she had been assaulted and robbed. Objection has been taken not to the fate of Mrs. Manley, which was probably justifiable on the narrower ground of interfering with the administration of justice,[2] but to the adoption by the Court of Criminal Appeal of the sweeping dictum of Lawrence J. in *R.* v. *Higgins* [3] that "all such acts or attempts as tend to the prejudice of the community are indictable." Embracing "any conduct sufficiently distasteful to the judges," [4] the decision failed to comply with the essential requirement of certainty in the field of criminal law and "opened wide the door to an indefinite multiplication by the judiciary of criminal offences," [5] For the reason therefore, that it contains strong dicta of the Court of Criminal Appeal disapproving of the decision in *R.* v. *Manley*, the recent Potteries Conspiracy case, *R.* v. *Newland and Others*,[6] is of considerable importance both to the criminal lawyer and the general public.

The accused were charged with "conspiracy to effect a public mischief by conspiring together with others by fraudulent means to distribute to the home market decorated domestic pottery whereby the said pottery was not available for currency other than that of the United Kingdom." The relevant Order [7] dealt merely with the position of pottery manufacturers and persons holding export certificates from the Board of Trade, referred to as registered exporters. No penalty was prescribed for such as the accused who

[1] [1933] 1 K.B. 529.
[2] "Public Mischief" in *The Modern Approach to Criminal Law*, at p. 71. Kenny's *Outlines of Commercial Law*, 16th ed., at p. 337. Viz. *R.* v. *Vreones* [1891] 1 Q.B. at p. 369.
[3] (1801) 2 East at p. 21.
[4] *The Modern Approach to Criminal Law*, at p. 297.
[5] Kenny's *Outlines of Criminal Law*, 16th ed., at p. 336.
[6] [1953] 2 All E.R. 1067; [1953] 3 W.L.R. 826. Reported in *The Times*, October 20 as *Regina* v. *Dean and Others*.
[7] Domestic Pottery (Manufacture and Supply) Order, 1947 (S.R. & O. 1947, No. 373) as amended (S.I. 1948, No. 1616).

gave false declarations to the manufacturers and registered exporters, that the goods would be sold for export, and in fact then diverted them to the home market. After a long trial they were convicted by Glyn-Jones J. for conspiracy to effect a public mischief and from that conviction they appealed, primarily on the ground that the charge was a crime not known to the law.

Since the case turned on the scope of the crime of conspiracy rather than on the existence of a crime of public mischief, there was little doubt, as the court concluded, that the conviction was good in law. Indeed the only cases the Court of Criminal Appeal in *R.* v. *Manley* had been able to find to support the proposition of Lawrence J. involved not public mischief *simpliciter* but a conspiracy to effect a public mischief [8] and, as Lord Goddard stated, it was much too late for the appellants to object that such a conspiracy was an offence unknown to the law.[9] The crime of conspiracy includes, inter alia, agreements to do lawful acts by unlawful means, and in this context the term " unlawful " has been subjected to such wide interpretation as to be said to cover agreements to hiss a play unfairly,[10] to resign commissions at a time of public danger,[11] to facilitate the seduction of a woman [12] or to raise the price of shares by false rumours,[13] acts which, however injurious or morally reprehensible, are not necessarily criminal if committed by a person acting alone and not in pursuance of a prior agreement. The public nature of the agreement in *R.* v. *Newland* served further to reinforce its criminality,[14] and the court rightly refused to accept the analogy of persons agreeing to exploit without deceit or fraud a loophole in the law.[15] A distinction could be drawn between such an agreement and that in *R.* v. *Newland* in which dishonest means were employed, sufficient, it would seem, even to sustain a charge of obtaining goods by false pretences, though this point was not taken in the judgment. In either event, whether viewed as an agreement to effect an unlawful purpose or to defeat the clear intentions of an

[8] *R.* v. *Brailsford* [1905] 2 K.B. 730, conspiracy to obtain a passport by false pretences; *R.* v. *Porter* [1910] 1 K.B. 369, conspiracy to indemnify sureties for bail. See, too, *R.* v. *Bassey* (1931) 47 T.L.R. 222, conspiracy to obtain admission to an Inn of Court by use of forged certificates.

[9] *viz.*, *R.* v. *Young* (1944) 30 Cr.App.R. 57; *R.* v. *Leese and Whitehead* (1936) 82 L.J.Newsp. 310.

[10] *Gregory* v. *Duke of Brunswick* (1843) 6 Man. & Gr. 205, a civil case. See, too, *Clifford* v. *Brandon* (1810) 2 Camp. 358.

[11] *Vertue* v. *Lord Clive* (1769) 4 Burr. 2472, *obiter*.

[12] *R.* v. *Howell* (1864) 4 F. & F. 160.

[13] *R.* v. *De Berenger* (1814) 3 M. & S. 67.

[14] *R.* v. *Daniell* (1704) 6 Mod.Rep. 99, *per* Holt C.J.

[15] The appellants had relied on Lord Tomlin's dictum in *Inland Revenue Commissioners* v. *Duke of Westminster* [1936] A.C. at p. 19 concerning agreements to avoid surtax or death duties. Whilst there is the danger, inherent in the law of conspiracy, that the courts may regard almost any means adopted to circumvent the clear intention of a statute as unlawful, such a description is clearly applicable to the use of fraud, falsehood and forgery. There is no need that the person from whom the goods are obtained should have suffered financial loss.

Act of Parliament by fraud and deceit, the facts of the case clearly disclosed a criminal conspiracy.

The importance of the decision of the Court of Criminal Appeal lies in its treatment of public mischief itself. Whilst it would not have been surprising had the court limited its judgment to upholding the conviction for conspiracy and approving its discretion to punish mischievous behaviour, the course it adopted was to repeat the objections which have been voiced by many writers [16] both to the dictum in *R.* v. *Higgins* and the decision in *R.* v. *Manley*. In particular it concluded that the statement of Lawrence J. was only an *obiter dictum* and that if upheld "it would leave to the judges to declare new crimes and enable them to hold anything which they considered prejudicial to the community to be a misdemeanour." [17] The public mischief cases, said Lord Goddard, should be regarded as part of the law of conspiracy [18] and the court should "hold the actions of an individual not committed in combination with others as indictable only if they constitute what has been held in the past to be common law or statutory offences." [19]

One short point may be queried. The court in *R.* v. *Newland* evidently thought that the present law governing public mischief can only be remedied by the House of Lords or by legislation.[20] In view of its own recent decision in *R.* v. *Taylor*,[21] this conclusion is rather surprising, though it may be that for the Court of Criminal Appeal to overrule one of its own decisions, it must sit in full court assembled for the purpose. This, however, is of little importance compared with the main issue in question, and one should feel grateful for this judicial recognition that it is "the province of the legislature and not of the judiciary to create new criminal offences." [22]

S. Prevezer.

Justices' Clerks retiring with the Bench

The decision of the Divisional Court in *R.* v. *Barry (Glamorgan) Justices, ex p. Nagi Kashim* [1953] 1 W.L.R. 1320 not only surprised the particular magistrates who had tried the case at petty sessions, but also brought to the boil a controversy over the

[16] *e g.*, W. T. S. Stallybrass, 49 L.Q.R. 183; A. L. Goodhart, 49 L.Q.R. 153; R. M. Jackson, 6 Camb.L.J. 193; C. K. Allen, *Legal Duties* 245.
[17] [1953] 2 All E.R. at p. 1073.
[18] See, however, *R.* v. *Wood* (1938) 3 J.Cr.Law 36, and the comments usually made with regard to *R.* v. *Robinson* [1915] 2 K.B. 342 on attempting to obtain by false pretences.
[19] [1953] 2 All E.R. at p. 1073.
[20] *Ibid.*, at p. 1072. One can agree with Lord Goddard that it is advisable, as a matter of policy, that the legislature should make the conduct of Mrs. Manley (and Mr. Robinson) a summary offence. This would appear preferable to relying on the rather vague and uncertain ground of interference with the administration of justice (*supra*).
[21] [1950] 2 K.B. 368.
[22] [1953] 2 All E.R. at p. 1073.

relationship of the justices' clerk to his Bench which had been simmering for some while.

The Divisional Court held that the magistrates were in error in insisting on taking their clerk with them when they retired to consider their decision, in the face of the protests of counsel for the defence, and when the only questions which remained for them to decide were questions of fact, namely, whether the accused, a café proprietor, was in possession of uncustomed American cigarettes with intent to defraud the Revenue. At the end of the case for the prosecution, defending counsel had submitted that there was no case to answer in law, and the justices had retired to consider this legal submission, taking with them their clerk to advise them. There could be no objection to this course, for, as the Divisional Court says, "the justices were entitled to tell their clerk to come out with them to give them his advice on the question of law that was raised." But, having decided this point against the accused, they were not in order in again taking the clerk with them when they retired at the end of the case to consider their decision, for this offended against one of the cardinal rules of the administration of magisterial justice, namely, that "on a point of fact, it is essential that the public should be able to see and to understand that the decision is the decision of the justices and of nobody else."

This consideration had been at the root of the direction given in the case of *R.* v. *East Kerrier Justices, ex p. Mundy* [1952] 2 Q.B. 719, where the Divisional Court, under the influence of Lord Goddard, had expressed the same principle in dealing with a somewhat similar case. The *East Kerrier* decision was described at the time as "something of a bomb-shell," because it was in direct opposition to the view expressed by Lord Roche's Committee, the *Departmental Committee on Justices' Clerks*, which reported in 1944 (Cmd. 6507), and which considered it to be "entirely proper and natural that justices may wish their clerk to retire with them, but this is a matter for the discretion of the justices" (§ 66). It was suggested in some quarters that Lord Goddard's remarks on this matter were *obiter*, and it was noted that both Hilbery and Devlin JJ. had hesitated before expressing their concurrence. It seems that not all magistrates' courts heeded the views of the Divisional Court, for in *R.* v. *Welshpool Justices, ex p. Holley* [1953] 3 W.L.R. 583, a case decided after the Barry magistrates had committed their blunder, Lord Goddard felt it necessary to say that it was the duty of justices "to obey a direction of this court not only in the letter, but in the spirit," and that they were not to get round the *East Kerrier* case in any way.

It is obvious, therefore, that the Barry magistrates were unwise in insisting on having their clerk retire with them at the end of the case, despite counsel's protests, though it may be some consolation to them to realise that their action has brought out in the open the

misgivings and doubts of those who felt that the *East Kerrier* ruling went too far in the direction of depriving the magistrates of the advice and guidance of their clerk in the interests of keeping up the appearance of our fair lady Justice. After correspondence in *The Times* and elsewhere and consideration of the matter by the Lord Chancellor's Department and the Magistrates' Association, the Lord Chief Justice has delivered a statement in the High Court (reported at [1953] 1 W.L.R. 1416) which was concurred in by the Lord Chancellor and all the judges concerned in the decisions mentioned above. This statement makes it clear that the magistrates are entitled to consult their clerk on any question of law or mixed law and fact, and that they may ask him for information on sentences passed for similar offences or to refresh their memory on the evidence. What should be avoided is the clerk automatically retiring with the justices as a matter of course. And if, in the magistrates' discretion, they ask him to retire with them or subsequently send for him, he should return to his place in court as soon as he is released by the justices, leaving them to complete their deliberations in his absence.

Under the present system of lay magistrates, this is probably about as clear a definition as can be made of the relationship of a clerk to his Bench when they retire.

This statement should enable justices to obtain all the legal assistance that they can reasonably require while, at the same time, avoiding any impression that the verdict is that of the clerk rather than that of the magistrates.

J. E. Hall Williams.

Matrimonial Cruelty and Insanity

When the Divorce Division grants a dissolution of marriage because of acts of cruelty, it does so not to protect the victim or any children of the marriage, but solely to punish the doer of the acts. This is what seems to have been laid down by the Court of Appeal of Somervell, Jenkins and Hodson L.JJ. in *Swan* v. *Swan*.[1]

This was a wife's appeal from the finding of a commissioner, who had dismissed her petition for divorce based on her husband's cruelty, on two grounds: (1) that she had condoned cruelty committed before August, 1949, and (2) that by reason of his insanity, the husband was not responsible for acts committed after that date, which could not therefore constitute cruelty. The Court of Appeal unanimously found that there had been no condonation of the earlier acts, and therefore allowed the wife's appeal. It may not therefore have been strictly necessary to decide whether the husband's insanity was an answer to the later acts of cruelty, but

[1] [1953] 2 All E.R. 854; 3 W.L.R. 591. This note is based on the report appearing in the *Weekly Law Reports*.

since each member of the court declared that insanity was a defence, at least where the respondent did not know what he was doing, it may be difficult for a later court, if so inclined, to treat these declarations as *obiter*. Hodson L.J. indicated that as that ground of the commissioner's finding had been challenged, he thought it right for the court to express its views on it; the other two members of the court gave no further explanation.

Hodson L.J. based his finding of lack of condonation on the element of forgiveness and felt "the conception of forgiveness difficult if not impossible where the object of forgiveness is not capable of receiving it by reason of the fact that he is out of his mind"; Somervell L.J. seems to have thought that the wife had never intended either to forgive or to reinstate; Jenkins L.J. gave no reasons.

As to insanity as a defence, Hodson L.J. agreed with Asquith L.J. in *White* v. *White* [2] that insanity would be a good defence, even if the respondent knew what he was doing, so long as he did not know that it was wrong; Somervell L.J., on the other hand, thought on the authority of *Squire* v. *Squire*,[3] that the second limb of the M'Naghten rules was no defence to such a petition, but that if the respondent did not know that the acts were directed against the petitioner, that might be a defence; Jenkins L.J. reserved the question for further consideration in a case in which it was necessary to the decision.

Hodson and Somervell L.JJ. both approved the dicta of Asquith L.J. and disagreed with those of Denning L.J. in *White* v. *White*; they disapproved of *Lissack* v. *Lissack*,[4] which would therefore seem to be overruled, and they disagreed with the Court of Session decision in *M'Lachlan* v. *M'Lachlan*.[5]

On the wording of the Matrimonial Causes Act, both these Lords Justices considered unconscious cruelty a contradiction in terms, and Somervell L.J. thought that in *M'Lachlan* v. *M'Lachlan* the "ordinary meaning" of the words used in the Act were made to give way in order to protect the wife. In other words, in his view the "ordinary meaning" of the word "cruel" imports *mens rea*. But surely the "ordinary meaning," as always, depends on the context and the point of view; whether one has in mind primarily the doer of the Act (with a view to punishment) or the victim (with a view to protection). The accepted definition of cruelty given by the House of Lords in *Russell* v. *Russell* [6] looks clearly towards the recipient, in considering not only danger to mental health, but reasonable apprehension of such danger, and the protection theory received strong reinforcement in the House of Lords only last year

[2] [1950] P. 39, C.A., of Bucknill, Asquith and Denning L.JJ.
[3] [1949] P. 51, C.A., the decision of Tucker and Evershed L.JJ.: Hodson J. dissented.
[4] [1951] P. 1.
[5] 1945 S.C. 382.
[6] [1895] P. 315, C.A.

in *Jamieson* v. *Jamieson*, when Lord Merriman in particular [7] stressed the relevance of the victim's apprehension of future danger.

The legislature in fact introduced a change of wording in 1937 when cruelty was first made a ground for the dissolution of a marriage. The wording of the Matrimonial Causes Act, 1857, s. 27, " guilty . . . of adultery coupled with . . . cruelty " was then replaced by an amended section 176 of the Supreme Court of Judicature (Consolidation) Act, 1925, which used the expression " treated . . . with cruelty." Hodson L.J. clearly thought this a change that made no difference when he said: " The word ' guilt ' carries with it a sense of wrong-doing and, as Henn Collins J. pointed out in *Astle* v. *Astle*,[8] the word ' treated ' seems to denote a conscious act." Even if, on the pre-1937 wording, the word " guilty " referred to the cruelty, the first part of this sentence would seem irrelevant since 1925, and the second an example of how the will of a puisne judge can curb the will of the supreme legislature in the face of the (presumably deliberate) change of wording by the latter. The preamble to the 1937 Act reads: " whereas it is expedient for the true support of marriage, the protection of children, *the removal of hardship*, the reduction of illicit unions and unseemly litigation . . . and the restoration of due respect for the law, that the Acts relating to marriage and divorce be amended. . . ." There is no mention here of guilt or punishment.

Moreover, Hodson L.J. could " find nothing in the old authorities to justify the proposition that a decree based on cruelty is a remedy given not for a wrong inflicted, but solely as a protection for the victim." Surely this is unnecessary. By the Matrimonial Causes Act, 1857, s. 22 (now repealed) the Divorce Court was, in proceedings *other than proceedings to dissolve a marriage*, to act and give relief on the principles of the ecclesiastical courts. The principle of mental cruelty has undergone some development since the days of the ecclesiastical courts: see, inter alia, *Jamieson* v. *Jamieson* and *King* v. *King* [9] in the House of Lords.

Those " realists " who concentrate on what the judges do rather than what they say will note that neither in *Astle* v. *Astle*, *White* v. *White*, nor *Swan* v. *Swan*, was the petitioner sent away without a decree, but if *Swan* v. *Swan* is taken as establishing that as regards cruelty there is no relief, but only punishment, the time must come when the unfortunate victim of violence from a spouse who does not know what he is doing will be unable to show any additional conscious act, and will therefore be denied either dissolution of marriage or judicial separation. Presumably, as Bucknill L.J. suggested in *White* v. *White*,[10] even such unconscious

[7] [1952] A.C. 525, at pp. 545–6, and see 16 M.L.R. pp. 68, 71–2.
[8] [1939] P. 415.
[9] [1953] A.C. 124, and see 16 M.L.R. p. 68.
[10] [1950] P. 39, 51.

acts would afford a good defence to a suit for restitution of conjugal rights. It is to be hoped that they would also constitute sufficient good cause to defeat a charge of desertion, though there seems no firm authority. But in considering the effect of the decision it is surprising to find Hodson L.J. equating the position of a spouse as regards unintended violence with that of a stranger, as when he said: "No effective protection is in fact provided by decree of the court from the violence of an insane spouse. He or she can only be protected in the same way as other members of the public by the incarceration of the insane partner. . . . If the respondent in *M'Lachlan* v. *M'Lachlan* had been unmarried and looked after by a sister or a nurse, the danger would have been the same." With great respect, this seems to overlook the essential nature of the special jurisdiction of the courts in matrimonial causes. Neither sister nor nurse would be bound to the insane person by law, by binding social obligation, by the possession of a common home, inescapable economic ties, or shared responsibilities towards children.

Perhaps not the least remarkable aspect of *Swan* v. *Swan* to the layman would be the complete absence in any judgment of a reference to the two children of the marriage who, though we are not told their ages, must both have been under fourteen at the time of the violence in 1949. Clearly their existence and the effect upon them of the violence of an insane father towards their mother, were considered wholly irrelevant to the question whether the legal bond between the parents should be dissolved or continued. For such an omission the Statute is, of course, also responsible, since the court is enjoined to consider the interests of the children only on the question of leave to petition for divorce within three years of the marriage, under section 2 (2). It may be hoped that, particularly in view of some of the evidence given before the Royal Commission by the National Society for the Prevention of Cruelty to Children, provision will soon be made for the interests of the children to receive at least some consideration on the vital question of the dissolution of their parents' marriage.

O. M. STONE.

RECOGNITION OF FOREIGN DIVORCES

Travers v. *Holley* [1953] P. 246 is a decision of the Court of Appeal which is of very great importance from the point of view of both the conflict of laws and jurisprudence.

The petitioning husband whose domicile of origin was English had been married to the respondent wife. They went to live in Australia where, in 1944, the wife obtained from a competent court of New South Wales a decree of dissolution of marriage on a ground substantially identical with section 18 of the Matrimonial Causes Act, 1950, *viz.*, that the husband, having been domiciled in New

South Wales, had deserted her as from 1940. The wife remarried in 1945 and the husband remarried in 1949. But in 1952 he brought a petition for dissolution of the marriage with the respondent on the ground of her adultery. He alleged that, since in 1943, when the respondent presented her petition in New South Wales, he was not domiciled there, the New South Wales decree was invalid in the eyes of an English court and that, consequently, the respondent's remarriage involved an adulterous association. This petition seemed to lack merit, because it was probably predicated upon the husband's wish to obtain his freedom not from the respondent " wife " from whom, for all practical purposes, he had in fact been divorced for years, but from his second wife whom he had not lawfully married, if the New South Wales decree was invalid.

The decisive question, however, was whether the husband was domiciled in New South Wales so as to confer jurisdiction upon the courts of that country. The fact was that in 1943 he was not so domiciled. Consequently the decision of the House of Lords in *Le Mesurier* v. *Le Mesurier* [1895] A.C. 517 seemed to support the husband's case, because it laid down the principle that a decree of dissolution of marriage pronounced by a foreign court is recognised as valid in England if, and only if, the husband was *at the date of the institution of the proceedings* domiciled in the country where the decree was pronounced.

However, the wife argued that (a) the husband was domiciled in New South Wales in 1940 when his desertion commenced and (b) this was sufficient to clothe the New South Wales decree with validity, because in New South Wales as well as in England since 1937 a deserted wife could obtain a decree of dissolution if the husband was domiciled in either country *at the time of the desertion*. These contentions were upheld by the Court of Appeal.

As to (a), Somervell and Hodson L.JJ. held that by 1940 the husband had acquired a domicile of choice in New South Wales. On this point Jenkins L.J. dissented and agreed with the views formed by the court of first instance. The decision, of course, rests on the facts, and these have not been fully reported. But one cannot help feeling that the view of the majority constitutes a further reaction against the implications of the much criticised decisions of the House of Lords in *Winans* v. *Att.-Gen.* [1904] A.C. 287, *Ramsay* v. *Liverpool Royal Infirmary* [1930] A.C. 588 and *Wahl* v. *Att.-Gen.* (1932) 147 L.T. 382,—a reaction which in the recent practice of the courts has become clearly discernible and which will certainly be welcomed by realistic observers. The acquisition of a domicile of choice ought not to be made too easy, but, on the other hand, it ought not to be impeded by those artificial barriers which the " voices of infallibility " (*per* MacKinnon L.J. in *Salisbury* v. *Gilmore* [1942] 2 K.B. 38 at p. 51) have erected.

As to (b), there used to be every justification for the impression

that a statute displaced the common law within the narrow limits of its words, but that outside those limits the common law provided not only the source of inspiration for the courts, but also continued to impose itself by virtue of the principle of *stare decisis*. What the Court of Appeal has done in the present case is to depart from a fundamental decision of the House of Lords by following the spirit and logic of a later statute rather than its wording, by acknowledging that if "Parliament has cut the ground from under the argument" based on the common law (*per* Hodson L.J. at p. 800), the latter no longer has binding force. This, therefore, is a case of the application of the maxim *cessante ratione cessat lex*—a maxim which was thought to be foreign to English law and which in numerous cases the courts have refused to adopt. It may suffice to refer to *Re Luck* [1940] Ch. 864 where, for the purpose of legitimation by recognition, the Court of Appeal preferred to follow the common law rules relating to legitimation by subsequent marriage, though they had been changed by the Legitimation Act, 1926. The elasticity which the principle of precedent is said to promote but which in truth it obstructs and which the courts ought to re-establish, will be greatly promoted by this new doctrine.

Within the specific area covered by the present case it means the formulation of the new rule according to which a decree of divorce pronounced by a foreign court is recognised as valid here if it is founded on circumstances in which English courts would assume jurisdiction: "Our courts . . . should recognise a jurisdiction which they themselves claim" (*per* Somervell L.J. at p. 797) or "what entitles an English court to assume jurisdiction must be equally effective in the case of a foreign court" (*per* Hodson L.J. at p. 800). It is submitted with great respect that this is sound and satisfactory law and that the Court of Appeal's approach to the problem should meet with universal approval.

F. A. MANN.

THE REPAIR OF LEASEHOLD PREMISES

Warren v. *Keen* [1953] 3 W.L.R. 702 is a good example of the uncertainty that can exist in law on matters which might have been expected to be settled long ago. The question involved was that of the liability of the weekly tenant to do repairs. The importance of the question is enhanced by the fact that as a result of the Rent Restriction Acts the tenant has a much greater interest in fact than the terms of the tenancy suggest. This factor was not, however, considered by the Court of Appeal to alter the general rule of law. In the result the court held that there was no general implied obligation on the weekly tenant to repair. The claim of the landlord was that the tenant should execute "fair and tenantable repairs" and should keep the premises wind- and water-tight. All members of the court agreed in rejecting both claims, and Denning

L.J. added that the second phrase—wind- and water-tight—was "of doubtful value and should be avoided." The utmost implied obligation on the weekly tenant is, it seems, "to use the premises in a tenant-like manner." That phrase is itself imprecise. Certainly the tenant is not liable to make good the consequences of fair wear and tear. It seems to amount to little more than a liability to do odd jobs of repairs, and such matters as sweeping chimneys and clearing drains, in fact little more than doing those things the neglect of which would amount to an abuse of the premises. The importance of the case goes somewhat further. It was generally said from *Wedd* v. *Porter* [1916] 2 K.B. 91 that the obligation of the tenant from year to year is to keep the premises wind- and water-tight. The force of that statement is weakened by the present decision, since Denning L.J. did not regard it as supported, on their proper construction, by the older authorities which had been relied on in *Wedd* v. *Porter*, and Somervell L.J. merely assumed that there might be some such liability, but expressly did not decide that there was. Certainly *Marsden* v. *Edward Heyes, Ltd.* [1927] 2 K.B. 1 appears to take a more limited view. Possibly it is merely that the obligation to use in a tenant-like manner imposes a liability on the tenant from year to year for somewhat more extensive operations in view of his greater interest.

The result is no doubt fair to the tenant. On the other hand, there does not appear to be any implied obligation springing from the tenancy which imposes any liability on the landlord to repair. There are obligations springing from housing legislation and the like when the house reaches the stage of unfitness for human habitation. That standard is both low and uncertain, and the present proposals for definition do not add greatly to its certainty. Since it cannot be denied that there is an interest of the community in maintaining its stock of houses, there is something to be said for having a liability for reasonable repair placed somewhere. The present Housing Repairs and Rents Bill goes some way to achieving that. It offers some sort of inducement to the landlord to repair by allowing a modest increase in rent, but it also holds out a threat, in that the increased rent can only be demanded as long as the premises are kept in repair. Something too is done by the added powers given to local authorities to deal with unfit houses. Whether enough has been done may be known in twenty years' time.

J. D. B. Mitchell.

Possession and Desertion in Australasia

Australian courts have also been faced with the problems of what to do with deserted wives who have remained on premises not belonging to them. Whereas the multiplicity of English actions in

the past few years has resulted in the formulation of principles—if not completely settled, at any rate pointing a way to settlement—the Australian cases leave some questions unresolved. This is in part due to the fact that there have been fewer decisions. But to some extent it is the result of the separate jurisdiction appertaining to each state of the Commonwealth of Australia.

Wherever possible, and in similar circumstances, the Australian courts have followed the English authorities. So in *Henderson* v. *Henderson* (1950) 51 S.R.(N.S.W.) 217, the Supreme Court of New South Wales had to consider the rights of a wife left in possession of the matrimonial home which belonged to the husband. The husband left the home and brought ejectment proceedings. In accordance with the English cases, which lay down that the wife's right to remain on the premises must be determined by the court in its discretion under the Married Women's Property Act, the Supreme Court refused to allow the husband's claim. An unusual case was *Eickert* v. *Eickert* (1951) Argus L.R. 576; but it aptly illustrates the protection afforded to wives by the present state of the law. There the wife was the owner of the matrimonial home; but the husband had assisted in the provision of the purchase price by helping to pay off the debt owing on the house. The spouses separated; the husband, however, was left in possession and continued to live in the home. Smith J. in the Victorian Supreme Court did not find that either party had deserted the other, although it seemed most likely that the wife was the guiltier of the two. When she claimed possession the question of blame was irrelevant and the husband was ordered to surrender the home to her. The only right he was held to have was an equitable charge on the property in respect of his share of the purchase price.

More interesting than these cases, however, and raising many arguable points (unfortunately not debatable here), is the judgment of Sholl J. in the Supreme Court of Victoria in *Brennan* v. *Thomas* (1953) Argus L.R. 214. The husband left his wife in his house and sold it to the plaintiff. Whether or not the husband was in desertion was not decided—apparently because it was not material (*sed quaere*?). One of the express terms of the sale to the plaintiff was that it was subject to the rights, if any, of the wife. When the plaintiff claimed possession he succeeded. For Sholl J., accepting the authority of Roxburgh J. in *Thompson* v. *Earthy* (1951) 2 K.B. 596—despite judicial and academic criticism, express and implied, of that case—held that the wife's right to remain in possession was a personal one, which was maintainable only against her husband; it was not proprietary, therefore it gave no protection against purchasers from the husband. Sholl J. refused to conclude that the statement of the wife's right in *Henderson* v. *Henderson* (*supra*), meant that a husband could not pass a better title to a purchaser than he himself had. Whether this decision

was in any way influenced by the apparent honesty of the transaction between the husband and the purchaser, is left doubtful. But Sholl J. candidly stated that he did not want to add, what might be called, new terrors or hazards to conveyancing, by putting a prospective purchaser or mortgagee on his inquiry as to the matrimonial status of the other party. This is a valid argument; but it is submitted that it does not satisfactorily deal with colourable transactions.

These were cases where the deserted spouse owned the premises. In them a line of authority is discernible. But there is scantier authority dealing with deserted wives whose husbands were tenants. In Victoria, on facts not involving rent restriction legislation or findings of desertion, a wife left in premises of which her husband had been tenant, was unprotected when he went out of occupation and surrendered his tenancy: *Zunnenberg* v. *Batt* (1948) V.L.R. 107. But McClemens J. in the Supreme Court of New South Wales in *Coen* v. *Costelloe* (1952) 69 W.N.(N.S.W.) 230, seemed more favourably inclined to the English view. There the plaintiff in ejectment proceedings was the assignee of the husband's tenancy and the purchaser of his furniture. He had deserted his wife and had left her in possession, with the furniture still on the premises. These premises came within the operation of New South Wales rent legislation. This case was, therefore, distinguishable from the Victorian one. His Honour held that the wife was protected (a) because, on the authority of earlier decisions in England, the husband still possessed the premises even though he was not himself physically occupying them, (b) because the legislation in question was enacted with the object of protecting tenants and their families. Here the wife was still a member of the husband's family, therefore she should not be ejected. But what was the true basis of the decision is hard to tell.

A more recent New South Wales case, however, *Webb* v. *Diethe* (1953) 70 W.N.(N.S.W.) 230 seems to clarify the position. For there the Full Court of the Supreme Court decided that as long as the deserted wife is on the premises the husband is still in possession for the purposes of rent restriction legislation, notwithstanding his intention to surrender, manifested in this case by a letter giving up the tenancy and enclosing the key to the premises. Owen J. followed the English cases without serious question. But Herron J., while agreeing in the result, remarked upon the conflict between the "deserted wives" cases and other Court of Appeal cases in which it has been held that a tenant had validly surrendered possession: (see *Brown* v. *Brash and Ambrose* [1948] 2 K.B. 247; *Thompson* v. *Ward* [1953] 2 W.L.R. 1042; and *cf. Taylor* v. *McHale* (1948) Estates Gazette Digest 299; contrast *Wiles* v. *Morse* (1950) Estates Gazette, April 8 and *King's College, Cambridge* v. *Kershman* (1948) 64 T.L.R. 547 *per* Lord Greene M.R. at p. 548). It would seem, therefore, that in the case of deserted wives a *new* "possession"

has been created, one where the possessor has neither the *animus* nor the *factum possidendi*—a curious result.

It will be seen from this brief discussion of the cases that, if and when the High Court of Australia has to grapple with these problems, it will not be without suggestions from State courts as to the correct mode of approach. An authoritative judgment from the High Court, however, would be very welcome.

Finally, in *Maxted* v. *Klee* (1953) N.Z.L.R. 450, an interesting example was provided of the effect on the law generally, and the law of deserted spouses in particular, of the discretionary powers vested in the court by the Married Women's Property Act, s. 17 (the corresponding section in New Zealand being section 19 of the Married Women's Property Act, 1952 (N.Z.)). There the plaintiff was suing for specific performance of a contract made with the defendant for the sale and purchase of a house. The house was occupied by the defendant's wife under an arrangement reached before a magistrate's court. This was evidenced in a note by the magistrate made, not at the time of the making of a separation order, but at the time orders for maintenance of the wife and children were made. This arrangement gave the wife "liberty to continue to reside" in the matrimonial home, while the husband was to pay the rates, mortgage instalments, etc.

Hutchison J. (without, however, referring to *Brennan* v. *Thomas* (1953) Argus L.R. 214), distinguished the case from the English ones involving claims for possession by purchasers from a husband, brought against the occupying *wife*. Nor did the learned judge think it necessary to decide whether the arrangement amounted to a licence, which avoided the necessity for determining the possible effect of such a licence upon the plaintiff, the purchaser.

The ground of Hutchison J.'s decision against the plaintiff was that to grant a decree of specific performance would require the defendant to dispossess his separated wife, which he was not legally entitled to do without an order under the Married Women's Property Act. As, under general rules of equity, decrees of specific performance will not be awarded if their effect is to compel somebody to do what he is not lawfully competent to do (*Fry on Specific Performance*, 6th ed., p. 194, para. 407), the only remedy open to the plaintiff was to begin a *new* action for damages.

G. H. L. FRIDMAN.

REVIEWS

THE CHANGING LAW. By THE RT. HON. SIR ALFRED DENNING. [London. Stevens & Sons Ltd. 1953. viii and 122 pp. 10s. net.]

THE major thesis of this extremely interesting book concerns the contribution which the judges have made in the past and are making today to the development of the law. It may be summed up in the author's statement that "the truth is that the law is often uncertain and it is continually being changed, or perhaps I should say developed, by the judges." No one can doubt that the judges do make new law from time to time, but whether they play quite so important a role in this field as is suggested in these five lectures may perhaps be open to question. As Mr. Justice Holmes has emphasised, a judge can only create new law "interstitially," and today the opportunities given to him to do so are strictly limited. Lord Justice Denning refers to Lord Mansfield as the obvious illustration of the creative judge, but he was peculiarly fortunate in his period and in his subject. Never again will a judge be given an opportunity to incorporate a novel branch of the law, such as the Law Merchant, with the common law. Nor is it likely that most modern judges would welcome such an opportunity, for it has become the established tradition of the English Bench that it is the primary function of a judge to interpret the law, and not to create it. The author is himself a notable illustration of what Sir Frederick Pollock has described as "Judicial Valour," but even he has been forced to work within a limited field.

In the first lecture on "The Spirit of the British Constitution" Lord Justice Denning emphasises the essential importance of the independence of the judges, guaranteed by the Act of Settlement. No one today would question this, but it is necessary to remember that the English bar has played an equally great part in the establishment of liberty. Freedom of the press and freedom of speech do not seem to owe to the judges as much as this book would suggest, for it can hardly be said that the judiciary played a distinguished part in these matters at the end of the eighteenth and the beginning of the nineteenth centuries. Here Erskine's name as an advocate stands supreme. The Inns of Court have not always been above criticism, but throughout English legal history they have been a bulwark of freedom. It is particularly important to emphasise this today when it may fall to the lot of counsel to defend an unpopular cause.

In the second chapter dealing with "The Rule of Law in the Welfare State" Lord Justice Denning seems to suggest that the Crown Proceedings Act, 1947, must be attributed in large part to the decision of the House of Lords in *Adams* v. *Naylor* [1946] A.C. 543. That decision undoubtedly made it clear that something must be done in the matter, but it was only the last step. We cannot get a true picture of this reform unless recognition is given to the long-continued efforts that had been made by the writers on tort and on constitutional law to bring about the necessary amendment. It was they who educated the legal profession so successfully that there was hardly a lawyer who did not favour this change. It therefore required only a final push to dislodge the various Government Departments from the intransigent position they had taken.

In dealing with the tortious liability of hospitals for the wrongful acts of their servants, Lord Justice Denning says (at p. 29): "The hospitals, however, afford the most striking illustration of how a nationalised undertaking

has been brought under the rule of law. In the days before nationalisation, the law was very tender towards charitable hospitals." With all respect, the change in the law relating to hospitals was so well under way before nationalisation was established that it is doubtful whether there is any relation between the two. In 1938 *The Law Quarterly Review* published an article entitled "Hospitals and Trained Nurses" (54 L.Q.R. 553) in which it was argued that the leading case of *Hillyer* v. *St. Bartholomew's Hospital* [1909] 2 K.B. 820 ought not to be construed as giving hospitals legal immunity for the negligent acts of their servants, even though they were acting in a professional capacity. It was pointed out that employers were held liable for the negligent acts both of sea and air pilots even though the employers themselves could not direct them how to act. This view of the law was accepted by the Court of Appeal in *Gold* v. *Essex County Council* [1942] 2 K.B. 23. With all respect, the fact that the defendant hospital was a county council hospital can hardly have had anything to do with the decision of that case. It would, indeed, be a strange thing if the courts were to change the law merely because the hospitals had been nationalised.

In the chapter on "The Changing Civil Law" the author deals with two problems which have been debated at great length in recent years. In referring to the *Hightrees Case* [1947] K.B. 130 he states (both at pp. 55 and 104) that "this doctrine warrants the proposition that the courts will not allow a person to go back on a promise which was intended to be binding, intended to be acted on, and has in fact been acted on." With all respect, this statement of the law is too wide, because, as Lord Justice Denning himself has pointed out elsewhere, the doctrine is limited to a form of estoppel. Put briefly, a person who has promised not to enforce an existing legal right against another cannot disregard this promise until he has given the other party an opportunity to be restored to his previous condition. This does not mean that the *Hightrees* case has not rendered a great service to the law by emphasising a doctrine of estoppel which had, in large part, been forgotten.

The second problem is concerned with the law of mistake. The author suggests that *Solle* v. *Butcher* [1950] 1 K.B. 671 has created a new equitable rule which has made a "most remarkable change" in legal doctrine, but it is difficult to find any subsequent case in which this rule has been applied. According to this doctrine a court may refuse to recognise that a contract is void on the ground of mistake except on such terms as it considers to be just. A not dissimilar equitable doctrine concerning frustration was firmly rejected by the House of Lords in *British Movietonews, Ltd.* v. *London & District Cinemas, Ltd.* [1952] A.C. 166. There is much to be said for a change in the law along the lines advocated by the author, but it is doubtful whether it can be achieved without legislation.

The fourth chapter on "The Rights of Women" is of particular interest as it discusses the protection which a deserted wife has been given in the matrimonial home, in particular against the landlord where the house which she occupies is within the Rent Restriction Acts. Whether the cases on this point constitute (p. 95) "a coherent body of law to meet the needs of modern times" has been disputed (*cf.* R. E. Megarry, "The Deserted Wife's Right to Occupy the Matrimonial Home" (1952) 68 L.Q.R. 379).

The last chapter on "The Influence of Religion" is the most controversial. Lord Justice Denning's thesis is that (p. 99), "without religion there can be no morality: and without morality there can be no law." It seems rather surprising to find it suggested that a man who may not have any fixed religious beliefs must therefore be regarded as amoral. It is not clear in this chapter whether the author is speaking of the Christian religion or of religion in general, nor whether his statements concerning various moral rules are to be regarded as of universal validity in all countries and in all circumstances or are related only to England at the present time. No one can dispute

the influence which the Christian religion has had on the development of English law, but it is startling to find such a complete identification between the two. It is not quite clear whether the law which is being discussed is an ideal law or is the law as it exists today. It might be desirable to base the law of contract on absolute truth and good faith, the law of tort on the principle "love thy neighbour," the rules of statutory interpretation on the principle "the letter killeth," the criminal law on the rule that an act must be morally blameworthy, *i.e.*, it must be a sin, to be punishable, and the law of family life on the indissolubility of marriage, but it would be difficult to show that the law has accepted any one of these doctrines. It may even be argued that it would not be desirable for the law to seek to establish so high a moral standard.

The various points raised in this book are of particular interest because they bring out clearly one of the major problems concerning law reform. Can this be accomplished to any appreciable extent by judicial interpretation, or must we rely primarily on such a body as the Law Reform Committee for amendments in the common law? I am not unprejudiced in this matter, so it will not be surprising if I express the view that the judges, sitting as judges, can play only a limited role, especially while the doctrine of the absolutely binding precedent remains in force. Law reform, to be of any value, must be carefully planned and boldly executed. The judicial process, which can at best deal with only particular cases, can hardly be expected to accomplish such a task. This, of course, does not mean that the important contributions made by the Bench to law reform should be underrated: full gratitude must be given to those judges who seek to bring the law into accord with the needs of a changing world.

A. L. Goodhart.

Justice. By Giorgio del Vecchio. Edited by A. H. Campbell. [Edinburgh: the University Press. xx + 236 pp. 30s.]

With greater understanding of Continental legal systems, English lawyers have recently become increasingly aware how much the differences between these systems and the English have been exaggerated. There has been a tendency towards more comparison and the pooling of ideas, and it is appropriate that the University of Edinburgh should act as catalyst in this process.

In presenting the first English translation of Del Vecchio's essay on Justice, Professor Campbell has in fact flung a bridge across one of the widest gulfs separating the legal worlds of England, or even of Scotland, and Italy. As he says at the beginning of his introduction, the philosophy of law has not flourished in the English-speaking world. Indeed it is neither unknown nor condemned for English lawyers in high places to boast in public their ignorance of jurisprudence.

It is a far cry from this attitude to an essay which originated as a lecture in 1922 by one of the foremost Continental jurists of the day, and has now been translated for the first time into English from the revised edition of 1946. The text occupies only some eighty pages, the bulk of the book consisting of the notes which follow each chapter. Chapter 13, on "Justice and Legality," in which four pages of text attract seventeen pages of notes, is exceptional, but the author could justifiably claim, in his preface to the 1946 edition, that he has included a rapid survey of the most important writings up to date on the subject of Justice. Linguistically these notes assume familiarity with Greek, Latin, German and French; reference to all the works cited would be a labour of years rather than months, but would be necessary to a full understanding of the argument, since frequently little

guidance is given as to the exact views of the writer or the precise points covered in the work cited (see, *e.g.*, note 2, pp. 191–2).

Such exuberance of citation is appropriate, if somewhat overwhelming, in the first six chapters of the book, which trace the development of the ideas of justice and natural law; but its value in the second part of the work, in which Del Vecchio propounds his own views on Justice, seems more doubtful. In his preface to the 1946 edition the author admits that he has given perhaps too much time and care to seeking out and recording correspondences and parallels between his own thought and that of others, and refers to those who judge the originality of a work by its paucity of citation. But surely the truth of a theory is unaffected by the number of those who have stated it before; one advantage the legal theorist has over the practical lawyer is that he is not bound to count, but free to weigh, the judgments of his predecessors, in the lights of changed conditions.

It is indeed the latter part of the book that the English reader is likely to find most difficult. The few categorical statements nearly all arouse misgivings. For example, on p. 79, the author says that "the belief that to our subjectivity is contraposited a subjectivity of others is a necessary moment in the development of our spirit and is not bound at all to the empirical perception of this or that individual." If this means, as I think it may, that as an inevitable step in my development, and irrespective of any communication or sympathy I may have with my neighbour, I will at some point realise that I am one among many, and a mere object on the periphery of my neighbour's world, I do not believe it is true. Surely, at least, after the wealth of citation on unimportant matters, one is entitled to demand fairly cogent evidence of such a controversial statement of fact, but not a shred is indicated. Again, at p. 144, the parent's responsibilities to his children are explained on the ground that "to bring a new being into life and abandon it deliberately . . . before it actually reaches its autarchy, is incompatible with the respect due to the absolute value of the person." Then we are assured that the child owes a corresponding duty of fidelity to his parents, and the relationship so outlined is then said to exist also between the individual and his "fatherland or nation," for which he must be prepared to sacrifice his life where necessary. This illustrates the more or less logical progression from the baseless assumption to the foregone conclusion. The discussion of the purpose of punishment seems a facile over-simplification by comparison with Kenny; other outmoded simplifications abound, as in the contrast drawn on p. 184 between "the guilty man" and his "innocent relatives."

Moreover, in contrast to the sparse legal theory of the common law countries, which is grounded in experience, Del Vecchio's theories seem immensely remote from turbulent humanity. His rare concrete proposals for legal reform are never related to their probable practical effects. The most important suggestion for reform is contained in the two Appendices on penal justice, and is, that for the most offences punishment should be replaced by reparation. He finds it strange (p. 213), that no serious scientific study has so far been undertaken to calculate the monetary cost of reparation for the harm done by criminals to public order and private interests. He does not himself indicate any basis for such a calculation, for example in cases of treason, murder and offences against the person, though he indicates that the condition and social rank of the injured person would be relevant factors. Once the amount of the criminal's debt for reparation is fixed, however, he considers that "protection" of the creditor should "take the form of the imposition upon the debtor of definite tasks, according to his capacity, having regard to all the circumstances, and always in humane and civil forms, such as would be established by law." These principles, of course, require translation into concrete proposals before they can be evaluated, but the author also appears unaware that compulsory labour involves restraint on freedom of movement, and that no society has yet found a method of restraint, the cost of which does not exceed the value of the work

done by the person restrained, so that payment of debts by this means is simply not a practical proposition.

Professor Campbell is clearly aware of these difficulties, and has inserted most useful notes relating the author's theories, when they seem most remote, not only to the world men live in, but to that part of it found within these islands. The English translation is, on the whole, clear; the rare obscurities, as, *e.g.*, in the passage cited from p. 79 and on p. 77, seem attributable to the original. The Edinburgh University Press has done its work of production well.

O. M. Stone.

Justice According to Law. By Roscoe Pound. [Yale University Press. London: Geoffrey Cumberlege. 98 pp. 1951; 2nd printing 1952. 16s.]

These lectures were delivered at Westminster College, U.S.A., under the Green Foundation which has already sponsored lectures by Count Sforza, Sir Winston Churchill and Reinhold Niebuhr. In them Dean Pound, with immense learning compressed into broad generalisations, discusses the meaning of "Justice," the meaning of "Law," and the problem of administering the one in accordance with the other.

Five theories of Justice are brought under review—an individual virtue (Greek philosophers), a moral idea (eighteenth-century lawyers), a régime of social control, the end or purpose of social control and so of law, and the ideal relation among men (Radbruch). Dean Pound incidentally mentions a distinction of his own, which he has expounded elsewhere, between "positive natural law" and "natural natural law." The purpose of law appears to be the maintaining of an ideal relation among men. But what is that ideal relation? Thinkers have continually gone behind an idea of the past to a more inclusive one. At first they thought of the end of law as keeping the peace, then as being for the purpose of maintaining the social order, then for the maximum of free self-assertion, and then for the maximum satisfaction of human wants or expectations. This last is the most inclusive order so far.

Three factors have made it difficult to answer the question of what law is. First, there is the need to reconcile the apparent opposition between rule and discretion. Secondly, law as a body of authoritative precepts may be looked at from four different points of view, *viz.*, those of the lawmaker, the individual subject, the judge, and the legal adviser. Holmes's prediction dictum is explained in its context and the point made that "It is the adviser, not the law, that does the predicting." Thirdly, law has been given the different meanings of the legal order, the body of authoritative guides to judicial or administrative decisions, and the judicial and administrative processes. The three ideas denoted by these meanings may be unified by the idea of social control, and the importance of the technique by which law is administered is here illustrated by reference to examples from Anglo-American, Roman and French law. For "law is more than an aggregate of laws. It is what makes laws living instruments of justice. It is what enables courts to administer justice by means of laws." Some shrewd blows are delivered in Part 2 against the legal realists, though they are still in the fight at p. 90 when the following knockout (or foul?) is delivered: "So-called realism in jurisprudence is related to realism in art rather than to philosophical realism. Like realism in art it is a cult of the ugly."

The third part considers in turn the advantages of and objections to adjudication by the legislature ("legislative justice"), by executive or administrative persons or bodies ("executive justice"), and by the ordinary courts ("judicial justice"). The problems are familiar to us on this side of the Atlantic, the arguments are stated with cogency and the conclusions will commend themselves

to most members of the legal profession. Altogether, this is a graceful addition to our collection of *Roscoepoundiana*.

O. Hood Phillips.

The Doctrines of Judicial Precedent in Scots Law. By T. B. Smith, m.a.(Oxon.), Advocate and Barrister-at-Law, Professor of Scots Law in the University of Aberdeen. [Edinburgh: W. Green & Son. 12s. 6d.]

Within recent years, Scottish legal scholars, both from the universities and from the law courts, have been providing two notable types of contribution to historical jurisprudence. On the one hand, the Stair Society has been publishing the sources from which it will ultimately be possible to write an adequate history of the law of Scotland. On the other hand, individual scholars have engaged in a series of legal monographs, of which hitherto the most significant has been Lord Cooper's *Supra Crepidam*, whose influence on the technique of legal research should be out of all proportion to its size. This monograph on Judicial Precedent by a former Eldon Law Scholar of Oxford well deserves to be placed in the same category as *Supra Crepidam*.

The root distinction between the Scottish and the English approach to judicial precedent is the distinction between the deductive and inductive methods. "To proceed from principles to instances is the characteristic of the one school," says Lord Macmillan. "To proceed from instances to principles —or perhaps not to proceed beyond instances—is the characteristic of the other." As the two legal systems have developed, the distinction has tended to become more and more blurred by various factors which are gradually assimilating most departments of each. None the less, in origin, they drew their respective strengths from separate traditions, and, as Lord Cooper has observed, the question which will soon have to be faced is "whether a better cement than rigid precedent cannot be found in more codification and in methodised reasoning from clear principles in accordance with the civilian tradition. The judge should not be the parties' oracle, but he must be something more than an animated index to the law reports."

It may be that the recent case of *Beith's Trustees*, 1950 S.C. 66, cited by Professor Smith, illustrates the difference so far as it still exists. There a Scottish court of three judges decided, by a majority, "not to follow" an earlier decision of seven judges, because its *ratio* rested on the common law rules prevailing in 1875 as to the diminished capacity of a married woman, whereas the general law regarding the property and rights of married women had been radically altered since that day. The Lord President laid down that "if it is manifest that the *ratio decidendi* upon which a previous decision has rested has been superseded and invalidated by subsequent legislation or from other like cause, this *ratio decidendi* ceases to be binding." As Professor Smith goes on to observe: If the Court of Session can thus "not follow" an earlier decision of a larger court, may it "apply the doctrine of desuetude and changed circumstances to decisions of the House of Lords?"

In Scotland, there was nothing comparable to the common law tradition. Precedent, in its broadest sense the desire to maintain general consistency of decision, had its—much later—origin in volumes of Practicks, wherein the *rationes decidendi* of important decisions were noted, by judges or counsel, for their own use. Most of the early law was not common law, but statute, the statute usually taking a simple form round which judicial interpretation gathered. At this stage, precedent was not binding—though a tract of similar decisions would be accepted as establishing the law and not to be departed from "except upon grave consideration." As late as the beginning of the nineteenth century, Baron Hume wrote: "The authority of precedents as a part of our law certainly is not established, but . . . they ought to have much

weight . . . A judge on this account will often decide according to precedents in preference to his own opinion, though he will not be guilty of a breach of duty if he swerve from them."

While the citing of precedents was well established in Scotland in eighteenth-century practice, it was not until the next century that doctrines of *stare decisis* began to take root. "The doctrine," says Lord Cooper, "formed no part of the classical law of Scotland, but crept in unobserved some hundred and fifty years ago, and we are now helpless in its suffocating grip." Most important was the influence of the House of Lords which, attracting increasing numbers of Scots appeals, tended also to assimilate doctrines of precedent. Other important, but less obvious, influences were the establishment of official law reports in Scotland, and the opportunity which the division of the Court of Session in 1808 gave to judges by allowing them more time to formulate their reasoned opinions. Professor Smith's conclusion is that, while Scots law is fundamentally a deductive system, and might well have been codified like those Continental systems with which it was most closely associated, in its later development it became partially interlocked with the case law system of England, in consequence of which, latterly, the development of legal principle in Scotland has become increasingly the province of case law, which by now has largely overlaid the basic system.

Professor Smith then discusses in detail the Scottish interpretation of *stare decisis*; the modifications which are attributable to the appellate jurisdiction of the House of Lords; and the Scottish interpretation of *ratio decidendi*; and concludes with a precise formulation of the law relating to the authority of the supreme and subordinate Scottish courts of law in both civil and criminal matters.

J. R. Philip.

Civil Procedure of the Trial Court in Historical Perspective. By Robert Wyness Millar, Emeritus Professor of Law in Northwestern University. [New York: The Law Center of New York University for the National Conference of Judicial Councils. 1952. 534 pp.]

In this notable contribution to the Judicial Administration Series the Emeritus Professor of Law in Northwestern University sets out to survey, from the standpoint of their historical progression, the major procedural rules employed in the United States and in England in the courts of first instance. After a brief, but illuminating, account in general of the antecedents of the Anglo-American system, the civil procedure in the early nineteenth century in England and the United States, and the subsequent course of reform in both countries, Professor Wyness Millar goes on to a detailed comparison of the development of specific phases of civil procedure in the two systems. He is not concerned with appellate procedure, but otherwise his chapters comprehend every stage from introduction of the cause to execution.

There has, of course, accumulated in the United States a large body of experience of the effectiveness of different procedural ideas. The author remarks that the somewhat exaggerated reverence for the modern English system which until recently existed among American lawyers has now given way to a more temperate appreciation which, while acknowledging the virtues of the English rules, recognises also that much important innovation has come from American initiative. Probably very few British lawyers realise how widely procedure varies in the courts of the states. There has, for example, been no uniformity in the development of the conjunct administration of law and equity. The New York Code of 1848 (which the author believes to have had an important influence in the drafting of the English Judicature Acts) contemplated the union of legal and equitable demands, and the system thereby

provided has been adopted in many states. In a minority, however, there has been no advance to any such union, although, in the author's view the Federal Rules of 1938, which declare that "there shall be but one form of action to be known as 'civil action'" will accelerate the acceptance of the principle of fusion. They have recently had this effect in New Jersey where until 1948 the separation of law and equity was preserved. Procedural differences between the states may be further illustrated from the sphere of jury trials. In some states the judge's charge precedes the closing arguments of counsel while in others it does not; in most states the judge may not comment on the evidence though in some he may; the number of jurors varies widely from state to state; in some states a majority verdict is competent, though not in all; the required majority varies from two-thirds in Montana to five-sixths in New York.

Professor Wyness Millar finds in the Federal Rules of 1938 the nearest approach yet made in American conditions to the realisation of a simple and effective system for the administration of civil justice. He welcomes the manner in which state procedure is increasingly conforming to their principles, and regards them as establishing what will ultimately become the general type of American civil procedure. At the same time he considers them far from perfect and has a number of penetrating and instructive criticisms to offer, three of which may be briefly mentioned here by way of example.

In his discussion of pleading he argues that the terms of Rule 8 (a) which require that relief claiming pleadings "shall contain a short and plain statement of the claim showing that the pleader is entitled to relief" are unsatisfactory. Does this mean that the plaintiff must state facts sufficient to show a cause of action? Or is a generalised summary of the case, which gives fair notice to the adversary of the nature and basis of the claim and a general indication of the type of litigation, all that is required? He urges acceptance of the principle that so far as regards statement of facts no more should be asked of a pleading than that it gives fair notice of the claim or defence. To this, he considers, should be appended in numbered propositions a statement of the legal theory or theories on which the pleader intends to rely. In many of the states, as in England, a plaintiff is usually entitled to succeed on any theory to which the facts alleged, as supported by proof, give rise. This, however, unfairly prejudices the defendant in the preparation of his case. The system advocated, it may be noted, corresponds closely to that which has long prevailed in the Scottish courts.

Professor Millar in an interesting comparison between the pre-trial hearing as envisaged by Rule 16 and the English summons for directions indicates his view that the former would be more valuable if it possessed the authoritarian aspect of its English counterpart. The pre-trial hearing is a conference between the attorneys for the parties held before a judge of the court, and its effectiveness depends on the voluntary co-operation of counsel. He feels that the court should have power to direct necessary amendment of pleadings, to require parties to indicate the methods of proof they intend to employ, and to limit the number of expert witnesses. While recognising the advantages of the English system he believes that American traditions prevent the immediate possibility of vesting in a master or commissioner the judicial power possessed by the English master, although he feels that this is a development which may at some future date be compelled by circumstances.

A striking difference between an American and an English jury trial is the absence in England of preliminary examination of the prospective jurors to ascertain whether or not there is any ground for challenge. The delay caused by this examination in America is greater in criminal than in civil cases but even in the latter it is frequently considerable. The author regrets the waste of time occasioned by such examination but believes it is too firmly entrenched to be easily dislodged. He considers, however, that such preliminary examination should be wholly in the hands of the court, counsel being entitled to

suggest further questions which the court would have discretion to put or to refuse. He regards it as unfortunate that Rule 47 (a) permits either the parties or their attorneys, or the court, to conduct the examination and regrets that the emphasis has not been clearly placed in favour of examination by the court.

As Professor Millar says, it is only since the middle of the nineteenth century that procedural reform in the Anglo-American system has taken on any vital or structural significance. Since then the gap between procedural rules and the demands of substantive law has been considerably reduced but it continues to exist. The recommendations of so distinguished a jurist will undoubtedly receive the respectful attention of his fellow lawyers in the United States. In Britain his book is to be welcomed not only for the light it throws on American practice and procedure, but also for the ideas for possible procedural development here which American experience provokes.

J. Aikman Smith.

Salmond on the Law of Torts. Eleventh edition by R. F. V. Heuston, M.A. [London: Sweet & Maxwell, Ltd. 1953. pp. liii and 794 (with index). £2 2s.]

There are many excellent features in this edition by Mr. Heuston, successor to the late Dr. Stallybrass. He has shown a nice sense of discrimination in deciding when to leave the text untouched and when to rewrite. His additions blend admirably with the original text and his style is lucid. The summaries of the effects of some of the new leading cases, *e.g., Thomson* v. *Deakin* at 409–11, are models of accuracy. The burden of adding all new relevant cases has been discharged very competently: the case digests, periodicals and the other valuable sources (including *The Times* and *Hansard*) have been combed thoroughly. Many interesting Irish cases have been introduced, and there is judicious annotation of Canadian and Australian authorities.

Omissions are few. The most surprising is perhaps *London Ferro-Concrete* v. *Justicz* (1951) 68 R.P.C. 261, where the Court of Appeal, in establishing that malice must be proved in slander of title, adopted a ten-line quotation from the previous edition which is also omitted from this one. Less importantly, *Sorrell* v. *Paget* [1950] K.B. at 259 (*per* Bucknill L.J.) might have been cited on conversion (the case is mentioned elsewhere but is not in the index); *Conway* v. *Wimpey* and *Young* v. *Box* at 548; *Drinkwater* v. *Kimber* at 533; *Haseldine* v. *Daw* at 551, and the explanation of that case in *Travers* v. *Gloucester Corporation* at 602.

In the sections on Negligence the following need attention. The treatment of setting aside a verdict and directing a new trial is confused and self-contradictory (514–16) and Goddard L.J.'s dictum in *Parry* v. *Aluminium Corp.* [1940] W.N. at 46, is omitted. Many cases are wrongly cited as examples of *res ipsa loquitur* (519); 519 (*f*) is an example of something frequently found throughout the book: a case cited for a proposition without mentioning that it was not the *ratio decidendi* and that other judges in the case took a different view (*cf.* 562 (*a*); but the worst instance is at 383, where in *The Albano* (not Albino) the *obiter dictum* of Lord Esher is relied on without stating that the other two judges expressly disagreed and where, incidentally, in the next sentence *N.C.B.* v. *Evans* is called upon to carry a load beyond its strength). The treatment of the Law Reform (Contributory Negligence) Act, 1945, is too brief (*cf.* the failure to incorporate the Defamation Act, 1952, smoothly into the text, and the misstatement of section 25 of the Sale of Goods Act at 331). *Stansbie* v. *Troman* is introduced into the text under the heading "where the law imposes a duty to guard against the *novus actus*" but it is a case in contract (169).

On contractual liability of occupiers we are told at 552 that there are two

types of implied term, (1) liability for independent contractors and (2) no liability for independent contractors where "the liability of the occupier is assimilated to that of his liability to an invitee"; yet at 563: "An occupier is liable to his invitees for the default of his independent contractors." It should not be assumed without discussion that the Law Reform (Contributory Negligence) Act applies to contracts (557), invitees (564), and licensees (572). At 586 it is first stated that an occupier has a duty to trespassers known to be present, and then the text continues: "He who shoots upon his land owes a duty of care . . . to trespassers whom he knows or ought to have known to be there (*Glasgow Corporation* v. *Muir*, *per* Lord Wright)": Lord Wright did not state this doubtful rule (the same case is miscited in another connection at 561).

We are warned at 648 not to confuse liability in *scienter* with negligence in relation to animals, but at 668 the editor falls into this very trap while incorporating a dictum of Sir Raymond Evershed in *Brock* v. *Richards* into the text (another example of stating only the *obiter dictum* of one judge in the case). There should be a reference to the dicta of Lord Macmillan in *Read* v. *Lyons* on dangerous things, and to *Donaldson* v. *McNiven* (680). The remainder of the section on chattels is marred by a failure to distinguish the "neighbour" rule of *Donoghue* v. *Stevenson* from its ruling on liability for chattels. This results in the following: at 682 "The only items which have been definitely excluded from this category [of products] are house-property and articles installed in or upon such property and careless statements"; in cases being treated as widening the duty of manufacturers when they were in fact based on the neighbour rule, *e.g.*, *Brown* v. *Cotterill*; and in particular in confusion about the reasonable possibility of intermediate examination thus *Denny* v. *Supplies, etc.* is accepted as a narrow rule case, which it is not (another common event here, giving a reference other than that in the *Law Reports*) and of course if this error is not perceived it is impossible to reconcile the case with the decision in *Horton's* case on possibility of examination in the narrow rule of *Donoghue* v. *Stevenson*; 684 (*f*) cites four cases supposedly on a point of chattel liability—none is on the point but the case in the immediately preceding footnote is.

Practitioners (for whom the book is also designed) may complain of the index having no case references, and of only four pages on the liability of employers to employees in negligence and for breach of statutory duty, and that too often, in matters of substance, footnote citations do not support the text or are otherwise inaccurate: *e.g.*, 85 (*i*); 113 (*l*); 166 (*i*); 170 (*g*); 173 (*a*); 176 (*h*) (text); 235 (*d*); 241 (*f*); 254 (*s*); 338 (*a*); 358 (*o*); 375 (*k*); 378 (*b*); 508 (*c*) and (*d*); 541 (*t*), (*x*) and (*y*); 559 (*a*); 591 (*f*); 620 (*p*); 638 (*l*) and (*m*); 653 (*k*); 655 (*u*); 678 (*g*) and (*k*); 679 (*n*) (and text); 680 (*r*) and 682 (*l*), (*m*) and (*r*). There are also far too many errors in citation of cases for a work in its eleventh edition.

Perhaps these minor defects in what is in many respects a valuable edition are to be attributed to the editor's having (as he tells us in his Preface) limited time in which to prepare it.

HARRY STREET.

SHIPPING LAW. By LORD CHORLEY, M.A., of the Inner Temple, Barrister-at-Law, formerly Sir Ernest Cassel Professor of Commercial Law in the University of London, and O. C. GILES, LL.M., of Gray's Inn, Barrister-at-Law. Third edition. [London: Sir Isaac Pitman & Sons, Ltd. 1952. xxvi and 358 and (index) 8 pp. 30s. net.]

THE tendency in recent years has been for students' textbooks to reach a higher standard than hitherto. This book is an outstanding example of this trend.

As the first edition was not reviewed in these pages, it is proposed to state shortly the principal contents of the book. It is divided into three parts. The first part deals with "The Ship" and contains three chapters devoted to "The Ship as Property," "The Equipment of the Ship" and "Master and Crew." The second part is entitled "The Running of the Ship" and is subdivided into four chapters on "The Contract of Passage," "The Contract of Affreightment," "Ancillary Contracts" and "Contingencies." The third part is entitled "Marine Insurance." In the appendices there are a bill of lading, a charterparty, Lloyd's Marine Insurance Policy, the Institute Cargo Clauses (F.P.A.) and—a welcome addition to the third edition—the full text of the Carriage of Goods by Sea Act, 1924. The work is the only students' book known to the present reviewer (apart from general works on commercial law) which deals with both contracts of affreightment and contracts of marine insurance.

It may be thought that the authors are too modest in the preface to the first edition when they say that they deal "in an elementary way" with the problems of shipping law. Much of the material, though no doubt "elementary" to a law lord or to a former professor of commercial law, is hardly elementary to a student. Hence the importance of a clear and interesting style, and in this respect the authors succeed admirably.

The text of the book has been carefully revised, and very few errors or omissions have been noticed. It was, however, surprising to learn from a footnote on p. 24 that the famous case of *Donoghue* v. *Stevenson* was decided by the Privy Council. The authors appear to have misinterpreted the Law Reform (Contributory Negligence) Act, 1945, when they say at p. 78: "Henceforth anyone who suffers damage partly by his own fault and partly by that of the defendant will lose his remedy only if his blame equalled or exceeded that of the defendant." On p. 182 it is incorrectly stated that in *Svendsen* v. *Wallace* (1884) 13 Q.B.D. 69; 10 App.Cas. 404, the expenses for repair of the ship and the warehousing charges were general average expenses. In the next edition the discussion as to what is a clean bill of lading (p. 144) might usefully direct attention to the decision of the Privy Council in *Canada and Dominion Sugar Co., Ltd.* v. *Canadian National (West Indies) Steamships, Ltd.* [1947] A.C. 46. Some account of the functions of forwarding agents and loading brokers would be appropriate in Chapter V. Finally, it would assist the reader if a few more headings were raised in the index: at present there is no entry for many subjects which one might expect to find, such as "average contribution," "charterer," "excepted perils," "King's enemies" and "particular average."

These suggestions, however, must not be allowed to obscure the fact that *Chorley and Giles* is a scholarly contribution to the literature on shipping law. *Scrutton on Charterparties* is now in its fifteenth edition. It would not be surprising if *Chorley and Giles* had as long and as useful a life.

J. Milnes Holden.

Kerr on Fraud and Mistake. Seventh Edition. By D. L. McDonnell, of the Middle Temple, Barrister-at-Law, and J. G. Monroe, of the Middle Temple and Lincoln's Inn, Barrister-at-Law. [London: Sweet & Maxwell, Ltd. 1952. liv and 738 pp. £6 6s.]

The new edition of *Kerr on Fraud and Mistake*, by Mr. McDonnell and Mr. Monroe, represents a solid piece of editing which is assuredly welcome not only to practising barristers and solicitors for purely utilitarian purposes; university lawyers too, engaged on the unending work of attaining synthesising rules and principles from an increasingly large and complex mass

of case and statute law, will find in it a rich and rewarding mine of material and argument over the wide field it covers.

The new edition states the law as at January 1, 1952. Compared with earlier editions, the principal changes in layout are twofold. A substantially new chapter concerning the effect of fraud and mistake on the position of third parties has been added, and the treatment of the various rules relating to fraud and mistake have on the whole been amalgamated with the important exception of the rules relating to contractual mistake: these have rightly, in the opinion of the reviewer, been treated of in a separate chapter. One change, it may respectfully be suggested, has been for the worse. The old multiple references to case reports in the footnotes have been abandoned in favour of a reference to one report series only, but no references at all appear in the Table of Cases, which consequently lacks a common and not inconsiderable amenity.

In so large a work, differences of interpretation and judgment between authors and reviewer can hardly be avoided. The following are among the points which have been noted in the course of an attentive and interested perusal, and, small and bigger, they are offered to the learned editors for their consideration.

(i) An analysis of the distinction between negotiating representations and contractual representations or terms (pp. 26–7) ought surely to start from the leading statement of general principle in *Heilbut, Symons* v. *Buckleton* [1913] A.C. 30. The rest is explanatory illustration of that principle. An omission might be pointed out of the recent illustrative case of *Thornalley* v. *Gostelow* (1947) 80 Ll.L.Rep. 507, which is interesting for two reasons: first, it virtually hangs over the dividing line between representations and contractual terms, and secondly (though strictly irrelevant in *Kerr*), it includes a successful action by an infant, as one of two co-plaintiffs, against an adult for breach of a trading contract (involving the supply of goods other than necessaries). Further, and finally, on this distinction between terms and representations, it may be noted that, while a feature is made of *De Lasalle* v. *Guildford* [1901] 2 K.B. 215 by giving its facts, they are given quite inadequately. When applying the principle in *Heilbut*, the exchanges between the parties during negotiations are all-important, and, in *De Lasalle*, the vital facts were constituted by the brief conversation between the lessor and the prospective tenant's wife. The nature of that conversation is omitted in *Kerr*, and so too is any reference at p. 29 to *Angel* v. *Jay* [1911] 1 K.B. 666, which is the perfect "sister" case to *De Lasalle* v. *Guildford*.

(ii) A statement of the effect of selling animals in market auctions "with all faults" (p. 62), ought to find space for *Couchman* v. *Hill* [1947] 1 All E.R. 103 and *Harling* v. *Eddy* [1951] 2 All E.R. 212 on the overriding force of a prior oral warranty-representation.

(iii) The interpretation, at p. 65, of the rule laid down in *Armstrong* v. *Strain* [1951] 1 T.L.R. 856 (and [1952] 1 All E.R. 139) appears to be an error.

(iv) In relating the rules regarding the recovery of premiums in respect of illegal insurance policies (p. 93), it would, it is respectfully suggested, be useful if it were pointed out that *Harse* v. *Pearl Life Assurance* [1904] 1 K.B. 558 involved an illegal policy as well as *Hughes* v. *Liverpool F. S.* [1916] 2 K.B. 482, and that, from the former case, one may infer that, in appropriate circumstances, "*in pari delicto*" may mean "equally innocent" as well as "equally guilty" of knowledge of the illegality.

(v) On p. 133, it is said that "the term 'mistake' in law means some misapprehension or misconception which has not been induced by a misrepresentation." As it stands, this proposition does not square with the cases (*e.g.*, *Cundy* v. *Lindsay* (1878) 3 App.Cas. 459) and ought to be more fully elaborated.

(vi) In the reviewer's personal opinion, the main defect in Chapter III

on Mistake is the failure adequately to consider the judicial reasons (at common law and in equity) for giving or refusing to give effect to a proven mistake, quite apart from the question whether the fact to which the mistake refers is or is not "fundamental." Thus, there occurs in the text the statement drawn from judicial pronouncement that, "Although in general the test of intention in the formation of contracts and the transfer of property is objective so that it is to be ascertained what the parties said or did, proof of mistake affirmatively excludes intention" (p. 152). The learned editors' attention is drawn to the problem of what possible meaning "proof of mistake affirmatively" has in this context and in the light of the relevant cases.

Again, in relation to the same matter, there is, at p. 174, the statement, "Where there has been some common mistake as to some essential fact, forming an inducement to a contract, . . . where the circumstances justify the inference that no contract would have been made if the whole truth had been known to the parties, the contract is voidable at the election of either of the parties." So far as the reviewer can judge, here too a failure to have regard to the policy reasons for giving effect to or ignoring a proven mistake, whether bilateral or unilateral, has led to an over-broad and over-simple proposition of law, which the learned editors will have difficulty in reconciling with the recent and, with respect, sound decision of Pilcher J. in *Harrison and Jones* v. *Bunten and Lancaster* [1953] 1 Q.B. 646.

(vii) It is surprising, in view of the special mention at p. 247 of the Bills of Exchange Act, 1882, s. 82, that the similar provision in section 80 is not also mentioned. In connection with the point to which section 82 and section 80 are relevant, the learned editors' attention is respectfully drawn to the case of misdelivery by a carrier at common law where protection of the carrier in an action for conversion, similar to that of the banks in the 1882 Act, has been attained by the unaided case law through founding the action for conversion on fault (*M'Kean* v. *M'Ivor* (1870) L.R. 6 Ex. 36, 41; *Duff* v. *Budd* (1822) 3 Brod. & B. 177; *Stephenson* v. *Hart* (1828) 4 Bing. 476; *Br. Traders* v. *Ubique Transport* [1952] 2 Ll.L.R. 236).

(viii) On p. 251, there occurs the sentence, "If the misrepresentation was innocent then the person relying on it cannot have been any less diligent than the person making it in ascertaining the truth." With respect, this is not exactly what James L.J. said in *Re Arnold* (1880) 14 Ch.D. 270, 281, which is cited in support; nor does it embody the true policy reason for ignoring the imprudence of the innocent misrepresentee, which it was apparently intended to embody.

(ix) When dealing with the question of remoteness of consequences in a tort action for deceit, at p. 497, it is a thousand pities that, after the extensive judicial and juristic debate that has taken place on the way in which the test of remoteness in tort should be formulated, the phrase, "immediate consequence," which is either meaningless or misleading, should be used.

(x) It is further a pity that there should be assigned as one of the reasons why money paid or property transferred under an illegal contract may be forfeited, the Latin maxim, *ex turpi causa non oritur actio* (p. 511). The maxim is surely only Latin for public policy, as pursued by the courts; and to state as much in English has the beneficial result of stimulating the mind to a more penetrating analysis of the policies involved, whilst the Latin tends, by its remote impressiveness, to embalm legal indolence. There is a passage of Lord Wright in *Beresford* v. *Royal Insurance* [1937] 2 K.B. 197, 219 (recently approved in *Marles* v. *Trant* [1953] 2 W.L.R. 564, 571) that is strong on this matter.

(xi) In examining the nature and scope of the doctrine of *restitutio in integrum* (pp. 513 *et seq.*), it is respectfully suggested that greater prominence ought to be given to Lord Wright's important statement on judicial policy regarding restitution respectively for innocent and fraudulent misrepresentation in *Spence* v. *Crawford* [1939] 3 All E.R. 271.

(xii) At pp. 532 *et seq.*, ought not the problem of rescission for innocent misrepresentation after the contract has been executed, to be regarded in the light of the equitable rule applied in *Cooper* v. *Phipps* (1867) L.R. 2 H.L. 149, that a bilateral mistake of fundamental fact renders a contract voidable even after it has been executed, particularly since Denning L.J.'s judgment in *Solle* v. *Butcher* [1950] 1 K.B. 671?

(xiii) Finally, although Jenkins L.J., in *Solle* v. *Butcher*, disagreed with Denning L.J.'s assertion that the rule in *Seddon's* case no longer applies to contracts concerning land (p. 535 (*d*)), it should also be pointed out that, in *Leaf's* case, Jenkins L.J. did agree with Denning L.J., that the rule was probably not applicable to contracts for the sale of goods ([1950] 2 K.B. 91). In addition, in *Leaf's* case, Jenkins L.J. generously acceded to the position adopted by the majority in *Solle* v. *Butcher*, so far as to remark, "In some of the cases, on the strength of the authorities concerning sales of land, the proposition has been stated in general terms to the effect that no executed contract can after completion be rescinded on the ground of innocent misrepresentation. As appears from the recent decision of the majority of this court in *Solle* v. *Butcher*, it seems probable that the proposition thus generally stated is unduly wide" (*ibid.*).

The above comments are not intended to and cannot detract from the merit of this new edition. The editors have by their learning and industry maintained *Kerr* in its honourable place as the standard work of reference.

C. GRUNFELD.

PRÉCIS DE DROIT INTERNATIONAL PRIVÉ. Volume 3. Second edition. By P. ARMINJON. [Paris: Librairie Dalloz. 1952. pp. 483.]

THE editorial history of this work is a little confusing. The third edition of the first volume appeared in 1947 and was reviewed at (1948) 11 Mod.L.R. 113. As regards Volume 2, we have to be content with the second edition published in 1934, but of Volume 3 a second edition has now been made available by the learned author in collaboration with Dr. Schloepfer. It deals with family law, intestate succession, jurisdiction, foreign judgments and awards, international conventions and evidence. The text is said to be brought up to date by references to new decisions and literature, but the English reader will notice, *e.g.*, that the references to *Dicey* are partly to the fourth, partly to the fifth and partly to the sixth edition (p. 384, note 2, p. 302, note 4, p. 272, note 2). About the law governing the non-contractual assignment of property on marriage we find the following statement (p. 96):

> La jurisprudence dans les pays anglo-saxons soumet le régime matrimonial à la loi de la situation des biens. A l'égard des meubles cette loi est, en vertu semble-t-il d'une fiction, celle du domicile des époux où les biens sont censés situés, c'est-à-dire du domicile que le mari avait lors du mariage où se proposait d'avoir pour cette époque.

This would seem to be a somewhat coloured summary unsupported by the reference to Dicey's sixth edition, pp. 535, 519 and 651; the two last-mentioned pages have nothing to do with the subject, while the much more relevant p. 795 is not brought to the reader's attention.

However, the treatment of this subject illustrates the author's methods in general. He discusses at length the four theories which have been propounded, *viz.*, that allegedly represented by Dicey; that which favours the law expressly or impliedly adopted by the parties and which is being followed by the French courts; the control of the personal law (nationality) of the husband at the time of the marriage—a view preferred by Professor Arminjon; the law of the matrimonial domicile—a solution suggested by the learned author for countries "où sont établis un grand nombre d'immigrants

étrangers," it being uncertain whether France is intended to be included in this description. The question of what law governs intestate succession is dealt with similarly. Again Professor Arminjon discusses four theories that have been suggested (pp. 115 *et seq.*): the *lex situs*; the law of the deceased's nationality; a theory which underlies the practice of the French courts and which to a large extent means the adoption of the law of the "domicil"; and finally the "vraie solution," favoured by the author, *i.e.*, the law of the "domicil"—"en prenant ce mot dans le sens large du principal établissement réel."

In short, this is a book from which the student will no doubt derive much benefit, but which does not always convince him that full justice has been done to the creative function of the judicial practice or that theoretical discussion has been saved from becoming a little stale. Yet it is clear that Professor Arminjon's treatise, being one of the leading French textbooks on the subject, is entitled to the greatest respect. What the foreign reader is likely to find particularly attractive is the fact that Professor Arminjon provides him with much historical material. This is often of considerable interest, because, contrary to widely prevailing impressions, the development in France prior to the coming into force of the Code Civil continues to exercise influence in this branch of the law.

F. A. MANN.

THE SYDNEY LAW REVIEW. Volume I, No. 1. [Sydney: Law Book Co. of Australasia Pty. Ltd. London: Sweet & Maxwell, Ltd. 10s. 6d.]

WE are delighted to welcome this first number of a new law review from the important Law School at Sydney. Professor Stone has been able to enlist a strong team to write the three articles contained in the first number which are full of interest and cover a wide field. Sir Raymond Evershed writes with his usual charm and wit on "Equity is not to be Presumed to be Past the Age of Child-Bearing," though he seems to be rather dubious about the children, and tends, like the servant girl, to excuse them as being "very little" ones. Sir John Latham contributes an important article on the problem of changing the Australian Constitution, and Mr. Willard J. Woelper deals most ably with the important reorganisation of the court system in New Jersey, which has recently taken place under Chief Justice Vanderbilt. He is administrative director under the new system, and much of what he has to say is exceedingly relevant to the problems with which we are faced in this country of simplifying the administration of justice and reducing its cost.

A novel and distinctly attractive feature of this number is an epistolary discussion between Dr. W. L. Morison and Mr. J. G. Fleming on a problem in connection with the duty of care arising out of Dr. Morison's article, "A Re-examination of the Duty of Care," in 11 M.L.R., which will be of interest to all students of the law of torts. There is also an important note on the problem of the pearl fisheries off the northern coasts of Australia, which has become the subject of a controversy in international law between that country and Japan.

The statute and case sections of the *Review* have been entrusted to the students of the Law School, who acquit themselves very creditably. This is, of course, in accordance with the practice of the American law schools, and no doubt derives from Professor Stone's long experience at Harvard.

C.